Supreme Court, U. S.
FILED
AUG 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-271

BANK OF THE COMMONWEALTH,
Petitioner,

—against—

ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,
Respondent,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR H. SCHWARTZ
445 Park Avenue
New York, New York 10022
Attorney for Petitioner
Bank of the Commonwealth

Of Counsel

HERBERT P. JACOBY
BURNS & JACOBY

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Bankhaus I.D. Herstatt Kga. A.i.L. No. 74 B 1134 (S.D.N.Y.) 8n

Clark v. *Williard,* 294 U.S. 211 (1935); Id. 292 U.S. 112 (1934) 10

Gamble v. *Daniels,* 39 F.2d 447 (8th Cir.) appeal dismissed 281 U.S. 705, cert. denied 282 U.S. 848 (1930) 5n

In re Independent Insurance Co., 13 F. Cas. 13 (C.C.D. Mass. 1872) 5n

In re Israel British Bank B.M. Tel Aviv No. 74 B 1635 (S.D.N.Y.) 8n

In re Manufacturer's National Bank, 16 F. Cas. 665 (N.D. Ill. 1873) 5n

In re Pacific States Savings & Loan Co., 27 F. Supp. 1009 (S.D. Cal. 1939) 6n

Sweatt v. *Boston H & E R. Co.,* 23 F. Cas. 530 (C.C.D. Mass. 1871) 5n

Thornhill v. *Bank of Louisiana,* 23 F. Cas. 1139 (C.C.D. La. 1870), appeal dismissed, sub nom. *Morgan* v. *Thornhill,* 78 U.S. 65 (1870) 5n

Vallely v. *Northern Fire and Marine Insurance Co.,* 254 U.S. 348 (1920) 6, 10

PAGE

Articles:

National Bankruptcy Conference, "Report of Special Committee on Insurance Companies and Foreign Banks Part I: Foreign Bank" (1975) 9, 10

Note: "United States Bankruptcy Jurisdiction over Unregulated Foreign Banks", 17 Harv. Int'l L.J. 359 (1976) 7

Sovern, "Section 4 of the Bankruptcy Act: The Excluded Corporations" 42 Minn. L. Rev. 171 (1957) .. 7n

IN THE

Supreme Court of the United States

October Term, 1976

No.

BANK OF THE COMMONWEALTH,
Petitioner,

—against—

ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,
Respondent,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Bank of the Commonwealth prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing the order of the District Court which had dismissed Respondent's voluntary petition in bankruptcy for lack of subject matter jurisdiction. This is a companion petition to one being filed by Federal Deposit Insurance Corporation, Petitioner's co-appellee in the Court of Appeals, and both petitions are accompanied by a Joint Appendix.

Opinions Below

The opinion of the Court of Appeals is reported at—F.2d—(2 Cir. 1976) and is included as Appendix A to the Joint Appendix. The opinion of the District Court, reversing the decision of the Bankruptcy Court which had denied Petitioner's motion to dismiss Respondent's bankruptcy petition, is reported at 401 F. Supp. 1159 (S.D.N.Y. 1975) and is included as Appendix B to the Joint Appendix. The opinion of the Bankruptcy Court is reported at 1 Bankr. Ct. Dec. 528 and is included as Appendix C to the Joint Appendix.*

Jurisdiction

The judgment of the Court of Appeals was entered on May 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Did the Bankruptcy Court have jurisdiction to entertain a voluntary petition in bankruptcy of a foreign banking corporation not doing business in the United States, but having assets located here, when it does not have jurisdiction under section 4(a) of the Bankruptcy Act to entertain the like petition of a domestic banking corporation?

Statutes Involved

Sections 1(8), 1(23), 2(a)(1) and 4 of the Bankruptcy Act, 11 U.S.C. §§ 1(8), 1(23), 11(a)(1) and 22 are included as Appendix D to the Joint Appendix.

Statement of the Case

Petitioner Bank of the Commonwealth (herein "Commonwealth") seeks review of the decision of the Court of

* Figures in parentheses preceded by the letters A or B refer, respectively, to pages of the decisions of the Court of Appeals or of the District Court, as the same appear in the Joint Appendix.

Appeals, which reversed the order of the District Court dismissing the voluntary petition in bankruptcy of Respondent Israel-British Bank (London) Limited (herein "IBB").

IBB is a banking corporation organized and existing under the laws of the United Kingdom and maintained its principal place of business for the conduct of its banking activities in London, England. Commonwealth is a banking corporation organized and existing under the laws of the State of Michigan.

On April 16, 1974, Commonwealth advanced the sum of $500,000 to IBB for a period of 90 days, such funds being made available to IBB, at its direction, in New York City. When IBB failed to repay the loan at its maturity on July 15, 1974, Commonwealth commenced an action in the United States District Court for the Southern District of New York, Docket No. 74 Civ. 3101, for the recovery of the monies loaned, together with interest thereon. Jurisdiction over IBB was obtained by attaching certain of its assets having a situs in New York. Upon the failure of IBB to appear or answer, following personal service of the Summons and Complaint upon it in London, Commonwealth obtained a judgment against it on September 11, 1974 in the sum of $519,923.90.

In the interim and on August 2, 1974, IBB filed a petition with the High Court, Chancery Division, of the United Kingdom, seeking a voluntary winding up of its affairs and on August 6, 1974 a Provisional Liquidator was appointed. On September 23, 1974, IBB acting through the Provisional Liquidator appointed by the High Court, filed a voluntary petition in bankruptcy in the District Court pursuant to Section 2(a)(1) of the Bankruptcy Act (herein the "Act").

On October 2, 1974, Commonwealth moved in the Bankruptcy Court for an order vacating and setting aside the adjudication of bankruptcy made on September 23, 1974,

and dismissing the voluntary petition. The basis of that motion was that under Section 4(a) of the Act, the Bankruptcy Court was without jurisdiction over the subject matter of the proceeding in that that Section provides: "Any person except a . . . *banking corporation* . . . shall be entitled to the benefits of this Act as a voluntary bankrupt."

The Bankruptcy Court denied Commonwealth's motion to dismiss. Together with Federal Deposit Insurance Corporation (herein "FDIC"), which had succeeded to the assets of Franklin National Bank, a co-movant in the Bankruptcy Court, Petitioner appealed to the District Court which on October 10, 1975 reversed the order of the Bankruptcy Court and dismissed IBB's petition.

On May 25, 1976, the Court of Appeals reversed the order of the District Court, predicating its conclusion on a finding that IBB, although a banking corporation in the United Kingdom, did not conduct a banking business in the United States. On this basis, the Court held that IBB was not a "banking corporation" within the meaning of Section 4(a) of the Act.

Reasons for Granting the Writ

The Court of Appeals Has Wrongly Decided an Important Question of Federal Bankruptcy Jurisdiction Which Has Not Been, But Should be, Settled by This Court.

In substantiation of this reason for the granting of certiorari, Petitioner Commonwealth adopts the arguments made by co-petitioner FDIC at pages 4 to 8 of its companion petition.

The Court of Appeals' Decision was an Unauthorized Exercise of Congress' Legislative Function and Conflicts in Principle With Decisions of This Court.

Both the Court of Appeals and the District Court recognize this to be a case "of first impression" (A-5a; 401 F. Supp. at 1160). That circumstance, however, did not signify that section 4 of the 1910 Act (Public Law 294, 61st Congress, 36 Stat. at L. 838 Chap. 412), and its counterparts in the 1898 Act (Public Law 171, 55th Congress, 30 Stat. at L. 544 Chap. 541) and the 1867 Act (March 2, 1867, 39th Congress, 14 Stat. at L. 517 Chap. 176)[1] had not been subject to extensive judicial analysis over many decades. The learning distilled from these earlier cases, comparatively little of which found its way into the Court of Appeals' opinion, although by no means controlling, had shed considerable light on Congressional intent,[2] as well as relevant policy considerations.

In this case, the District Court had perceived no requirement in the Act that a foreign banking corporation must "*operate* as a bank within the United States" in order to fit within the Act's exceptions, and refused to "write such

---

1. Much of the language of §4(b) of the 1910 Act was derived from the 1867 Act. Under that statute it had been held that railroad corporations (*Sweatt* v. *Boston H & E R. Co.*, 23 F. Cas. 530 [C.C.D. Mass. 1871]), insurance corporations (*In re Independent Ins. Co.*, 13 F. Cas. 13 [C.C.D. Mass. 1872]) and state banking corporations (*Thornhill* v. *Bank of Louisiana*, 23 F. Cas. 1139 [C.C.D. La. 1870] appeal dismissed *sub nom. Morgan* v. *Thornhill*, 78 U.S. 65 [1870]), but not national banks (*In re Manufacturer's National Bank*, 16 F. Cas. 665 [N.D. Ill. 1873]), were amenable to involuntary bankruptcy proceedings.

2. For example, in *Gamble* v. *Daniels*, 39 F.2d 447, *appeal dismissed* 281 U.S. 705, *cert. denied* 282 U.S. 848 (1930) the Eighth Circuit had concluded (at p. 450):

> "We have no doubt that when Congress used the words 'banking corporation' it meant corporations which were *authorized by the laws of their creation* to do a banking business." [Emphasis added].

a requirement into the Act" 401 F. Supp. at 1162 (B-4b). The Court of Appeals, however, adopted a wholly different judicial philosophy and, applying a factual "activities" test to its determination of jurdisdiction *vel non* (A-11a-12a), evinced no such reluctance. The "activities" approach had, because of the language of that statute, chara terized the decisions under the 1898 Act, but it was one which had been intentionally discarded by the draftsmen of the 1910 Act, as this Court had made perfectly clear in *Vallely* v. *Northern Fire and Marine Insurance Co.*, 254 U.S. 348 at 355 (1920). Notwithstanding this Court's injunction in *Vallely* that to extend the application of the Act to one of the excluded corporations, even—as in that case—with its acquiescence, was "to enact a law, not to execute one" (p. 356),[3] the Court of Appeals had no compunction about filling in what it determined to be a chink in the armor of the Bankruptcy Court "that Congress [had] failed to consider" (A-6a). By so doing, that Court appropriated to itself a legislative function.

With due deference to the esteemed panel constituting the Court of Appeals in this case, it is submitted that that Court literally bulled its way to a preconceived conclusion, in order to avoid what it considered to be "an inequitable result" (A-12a), even if it were required "to enact a law" to accomplish that objective. In the process, it brushed aside analogous decisions, including those of this Court, which appeared to point in an opposite direction, ignored the research as to Congressional purpose assembled by the only legal scholar who had seriously analyzed the back-

3. On the authority of *Vallely* at least one court has concluded that "when it appears *on the face of a petition* that a corporation is in the excepted class, the authority of the court to act is absolutely at an end." *In re Pacific States Savings & Loan Co.* 27 F. Supp. 1009 at 1011 (S.D. Cal., 1939).

ground of section 4,[4] grossly misread the legislative history of that section, and leaned far too heavily on the outmoded maxim that statutory exceptions "are to be strictly construed"—all in the name of the rubric that "equality of distribution" is "the theme of the Bankruptcy Act." (A-7a).[5] That its ultimate decision was wrong, is of concern to the parties alone. But the serious consequences which that decision portends in the field of both local and international banking and finance, as well as for bankruptcy jurisdiction generally, are matters that are of common concern and call for this Court's intervention.

It is not without significance that the type of judicial legislation engaged in by the Court of Appeals was undertaken at the very time that Congress itself, in its deliberations on the proposed Bankruptcy Act of 1975 (H.R. 31, 94th Cong. 1st Sess. [1975], prepared by the Commission on the Bankruptcy Laws of the United States, and H.R. 32, 94th Cong. 1st Sess. [1975], sponsored by the National Conference of Bankruptcy Judges), was considering suggested amendments to §4 that would deal directly with the identical question at issue. See, Note: *United States Bankruptcy Jurisdiction over Unregulated Foreign Banks*, 17 Harv. Int'l L.J. 359 at 385 et seq. (1976).[6] Normal judicial

4. Dean Michael Sovern's classic article "Section 4 of the Bankruptcy Act: The Excluded Corporations", 42 Minn. L. Rev. 171 (1957), to which the District Court had made repeated reference, appears to have been accorded short shrift by the Court of Appeals.

5. This "bootstrap" approach to the question of bankruptcy jurisdiction had been rejected by the District Court which had quite properly observed: "[T]his argument [equality of distribution] presupposes jurisdiction under the Act and is of no relevance to the initial determination whether jurisdiction exists. The purpose of enacting the exceptions in §4 was not to achieve equality of distribution, but to avoid application of the bankruptcy laws to what Congress viewed as inappropriate situations." 401 F. Supp. at 1174 (B-29b).

6. This rather searching article deals extensively with the instant case at the District Court level, but was apparently written prior to the reversal by the Court of Appeals.

restraint should have dictated a reluctance to impinge on Congressional prerogatives at this critical stage in the legislative process, leaving it to that body to determine whether the "plain meaning" of the existing statutory language called for any clarifying changes and, if so, the nature and extent thereof. But, as is all too frequently the case when proper judicial bounds are overstepped, the solution here devised by the Court of Appeals leads to unanticipated problems of the gravest character.

If a foreign banking corporation not doing business here but having assets in this country is not a "banking corporation" within the meaning of the voluntary bankruptcy provisions of section 4(a) of the Act, it necessarily follows that such a corporation is not a "banking corporation", for the purpose of *involuntary* proceedings, within the meaning of section 4(b). Thus, the Court of Appeals' determination in this case not only will sanction, but will encourage, the institution of involuntary bankruptcy proceedings against foreign "banking corporations",[7]—as well as foreign railroad corporations, insurance corporations and building and loan associations—having assets in the district where such a proceeding is brought, but in no other way subject to the control of the United States Bankruptcy Court.

The life blood of any banking enterprise, whether domestic or foreign, is its ability to attract and retain deposits. Anything that reflects adversely on the soundness of its financial condition may well result in a sharp increase in the normal rate of withdrawals causing insurmountable liquidity problems for a bank. The disastrous

7. *In re Israel-British Bank B.M. Tel Aviv,* No. 74 B 1635 (S.D.N.Y.), instituted by three *non-resident alien* creditors, is such a proceeding presently pending in the Southern District of New York. *Bankhaus I.D. Herstatt Kga A.i.L.* No. 74 B 1134 (S.D.N.Y.), which has recently been settled, was likewise a proceeding falling within that category.

effect that the mere bringing of bankruptcy proceedings in the United States against a foreign bank may have upon the institution involved as a whole, is too clear to require elaboration. National Bankruptcy Conference, *Report of Special Committee on Insurance Companies and Foreign Banks* Part I: Foreign Banks at p. 16 (1975) (herein "NBC *Report*"). Furthermore, the very knowledge that they are amenable to such proceedings in this country would of necessity induce a disinclination on the part of foreign banks to maintain funds on deposit with banks in the United States, thus undermining relationships that characterize the normal functioning of the international banking community.

Then, too, if our federal Bankruptcy Courts are to be permitted expanded jurisdiction over foreign banking corporations which do not do business in this country, merely on the basis of their having assets in the United States, it is but a fair exercise of international comity for the courts of foreign countries to assume a similarly liberal attitude toward permitting insolvency proceedings to be maintained against United States banks having property within their jurisdiction. NBC *Report, supra,* at 17-18. Indeed, under the Court of Appeals' ruling, it would appear that a state-chartered bank, having assets in another state, could be denied the statutory exemption for a "banking corporation" and be susceptible to involuntary bankruptcy in a federal court in such other state, notwithstanding the fact that rehabilitation proceedings might simultaneously be pending in the state of its domicil.

The doctrine of separation of powers, so basic to our system of government, is a delicate mechanism. To tamper with it, is to run risks which are rarely so apparent as they are in this case. Congress alone can, if it sees fit to do so, adopt a statute allowing foreign banking corporations to avail themselves of voluntary bankruptcy proceedings, and

at the same time foreclose their creditors from instituting involuntary proceedings against them. NBC *Report, supra,* pp. 18-19. Having opened the door to the former possibility, the Court of Appeals was and is incapable—short of reversing itself—of shutting it to the latter.

"Federalism", so heavily relied on by the Court of Appeals to justify its conclusion, is a two-sided coin. When Congress itself has not evinced an intention to exercise its bankruptcy authority under Article 1, section 8 of the Constitution, this Court has recognized that the states have reserved power over property within their territorial limits and the right to apply to it policies of their own formulation for the protection of local creditors which need not be designed to achieve equality of distribution. *Clark* v. *Williard,* 294 U.S. 211, 213 (1935); *Id.* 292 U.S. 112, 123-124 (1934). Preemption of that state power is not to be lightly presumed. For the Court of Appeals to assert federal bankruptcy jurisdiction over foreign banking corporations because it could find "no Congressional purpose to command otherwise" (A-12a), was not to practice "federalism", but rather to subvert it.

By attributing to Congress a purpose which the District Court had painstakingly demonstrated to be wholly lacking, by departing from the path which had been blazed by this Court in *Vallely, supra,* and in *Clark* v. *Williard, supra,* and by arrogating to itself legislative powers with which it had never been constitutionally vested, the Court of Appeals has enlarged the jurisdiction of the Bankruptcy Courts in a fashion which is fraught with perils far beyond any that could reasonably have been within its contemplation. Only this Court can replace the lid on this Pandora's box, and restore to Congress, where it rightfully belongs, the task of delineating, if it deems it appropriate to do so, specific ground rules for bankruptcy jurisdiction with respect to foreign "banking corporations".

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

ARTHUR H. SCHWARTZ
445 Park Avenue
New York, New York 10022
Attorney for Petitioner
Bank of the Commonwealth

Of Counsel

HERBERT P. JACOBY
BURNS & JACOBY

Supreme Court, U. S.
FILED
AUG 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-272

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,

Petitioner,

v.

ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,

Respondent,

and

BANK OF THE COMMONWEALTH,

Respondent.

No. 76-271

BANK OF THE COMMONWEALTH,

Petitioner,

v.

ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,

Respondent,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND COURT

JOINT APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 721—September Term, 1975

Argued March 12, 1976 Decided May 25, 1976

Docket No. 75-5020

In the Matter

of

ISRAEL-BRITISH BANK (LONDON) LIMITED,

Bankrupt.

ISRAEL-BRITISH BANK (LONDON) LIMITED,

Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as successor in interest to Franklin
National Bank, and BANK OF THE COMMONWEALTH,

Appellees.

Before FRIENDLY, MULLIGAN and GURFEIN, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge,* dismissing a voluntary bankruptcy petition by a foreign banking corporation not authorized to do business in

the United States, on the ground that it was a "banking corporation" and, hence, ineligible to file a voluntary petition for bankruptcy under § 4a of the Bankruptcy Act, 11 U.S.C. § 22(a).

Reversed.

GURFEIN, *Circuit Judge*:

The Israel-British Bank (London) Ltd. ("IBB") was a British bank engaged in the banking business in London. It did no banking business in the United States, nor was it licensed in any state to do such business. It did borrow Eurodollars and U.S. dollars from American banks, including appellees, among others. It also maintained deposits in United States banks.

On July 11, 1974, a loan of Eurodollars made to it by the Franklin National Bank ("Franklin"), the principal and interest amounting to approximately $2,100,000, became due and was not paid. On July 15, 1974, a loan of U.S. Dollars made to it by the Bank of the Commonwealth ("Commonwealth"), a Michigan bank, in the amount of $500,000 plus interest, became due and was not paid.

On July 22, 1974, Commonwealth started an action against IBB in the Southern District of New York to recover its loan with interest and obtained an order of attachment in the sum of $515,385.42 plus probable interest. The order of attachment was served on a number of banks holding deposits of IBB and attachments were made.

On July 26, 1974, Franklin followed suit and obtained an order of attachment which was served on a number of banks in New York. Commonwealth made personal service on IBB in London on August 6, 1974, and obtained a final default judgment for $519,923.90, which was entered in the Southern District on September 11, 1974. Franklin itself is now being liquidated by appellee Federal Deposit Insurance Corporation.

In the meantime, while these matters were proceeding in the federal court, IBB, being unable to pay its debts, voluntarily filed a debtor's petition for the winding up of its affairs, pursuant to Section 222 of the English Companies Act, 11 & 12 Geo. 6, c. 38 (1948), with the High Court, Chancery Division, of the United Kingdom.[1] On August 6, 1974, a receiving order was made by that court constituting Arthur Thomas Cheek, Senior Official Receiver, as Receiver and Provisional Liquidator of the property of petitioner.

On September 23, 1974, before Franklin could obtain a judgment, and before Commonwealth could compel payment of the default judgment it had obtained, IBB filed a voluntary petition in bankruptcy in the Southern District of New York. It was adjudicated a bankrupt on the same day. The appellees promptly filed motions to vacate the adjudication and to dismiss the involuntary petition on the ground that the Bankruptcy Court lacked jurisdiction over the subject matter.

While the motions were *sub judice* before Bankruptcy Judge Galgay, the High Court in England issued an order dated October 9, 1974 authorizing the appointment of counsel in New York "to take such steps and to institute such proceedings including the filing of a bankruptcy petition against the company as they may advise and as the said Official Receiver may authorize them to take to insure that the assets of the said company situate in the United States of America become available for the benefit of creditors general."

We take the bankruptcy proceeding here to be in aid of the order of the High Court that the assets in the United

1. In the United Kingdom, companies (corporations) cannot be made bankrupt. Bankruptcy Act, 4 & 5 Geo. 5, c. 59, § 126 (1914). Accordingly, companies go through the equivalent winding-up procedure prescribed by the Companies Act, 1948. See Charlesworth's Company Law 356 (9 ed. T.E. Cain 1968).

States become available to the creditors on the basis of equality. If the assets involved had been situated in the United Kingdom, the High Court could have restrained and set aside the atachment and judgment as having been made within six months of the petition for winding up. See Companies Act, 11 & 12 Geo. 6, c. 38, § 320(1) (1948). But the High Court, of course, has no extraterritorial jurisdiction beyond the United Kingdom.

If there is jurisdiction to sustain the American adjudication in bankruptcy of IBB, the American trustee will be in a position to bring a proceeding for avoidance of liens obtained by attachment or judgment within four months of the filing of the petition if the bankrupt was insolvent at the time. Bankruptcy Act § 67a(1), 11 U.S.C. § 107(a)(1). If there is no jurisdiction to entertain a voluntary bankruptcy petition for IBB, the liens will be good, and appellees will fare better than United States creditors—among others.

Section 4a of the Bankruptcy Act, 11 U.S.C. § 22(a), on which appellees' motion to vacate and dismiss was grounded, provides as follows:

> "Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan asociation, shall be entitled to the benefits of this title as a voluntary bankrupt."

IBB, if it is considered simply as a foreign corporation, was entitled to voluntary bankruptcy under Section 2a(1) of the Bankruptcy Act, 11 U.S.C. § 11(a)(1), even though it did not have its "principal place of business . . . or . . . domicile" in the United States, since it had property "within their jurisdiction" (*i.e.*, within the jurisdiction of the Bankruptcy Courts of the United States). As the Bankruptcy Judge found, IBB had property in the Southern District in the form of deposits of money held by five banks in New York City.

Appellees maintain, however, that IBB is a "banking corporation" and, as such, is not entitled to the benefits of voluntary bankruptcy. Bankruptcy Judge Galgay, in a thorough opinion, held that IBB was not a "banking corporation" within the meaning of the Bankruptcy Act and denied the motions to dismiss the voluntary petition. On appeal, the District Court, Morris E. Lasker, *Judge,* in an equally scholarly opinion, reversed the decision of the Bankruptcy Court and dismissed the petition in bankruptcy. 401 F. Supp. 1159 (S.D.N.Y. 1975). This appeal followed.

The case is one of first impression and involves an interesting question of statutory construction. We have concluded that the petition in bankruptcy by IBB should not have been dismissed. We accordingly reverse.

All parties have briefed the legislative history of Section 4 quite extensively in an attempt to find some elusive clue to its meaning. Judge Lasker ultimately concluded that "when Congress in 1898 and 1910 specified in § 4 of the Bankruptcy Act who may and may not be adjudicated a bankrupt, it did not specifically address the question before us: Does the Bankruptcy Court have jurisdiction to entertain a foreign banking corporation's voluntary petition in bankruptcy?" 401 F. Supp. at 1160. Though recognizing that Congress had not specifically addressed the question, the judge, after exploring whether application of the exception to foreign banks "would further or would thwart the objectives of the statute," *id.* at 1170, felt constrained to follow the "plain meaning" of the words.

There is no field in which contrary conclusions based on contrary premises may be so readily drawn as in the interpretation of statutes. In a sense, each statute stands on as own. And it may be disputed whether words, even in their common-sense meaning, bring a sure guide to interpretation of every statute. As Justice Frankfurter noted, "[o]ne must also listen attentively to what it [the statute]

does not say." Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 536 (1947). This statute says nothing about "foreign banking corporations" as such.

If we acknowledge, as did the District Court, that Congress failed to consider *foreign* banking corporations when creating the exceptions to eligibility for bankruptcy, are we, nevertheless, required to recognize within the exception what was never in its consideration? There is no plain meaning in "banking corporation" to compel such a result. See *McBoyle* v. *United States,* 283 U.S. 25 (1931), where Justice Holmes found that an airplane was not a "motor vehicle" though it was propelled by a motor.

Since we cannot find a final answer in the words themselves, we must employ other methods. We may consider the history of the phrase as it finally evolved, with particular reference to the language used in earlier statutes. We may also search for the policy intended to be enacted. As Justice Cardozo wrote: "[The words] came into the statute . . . freighted with the meaning imparted to them by the mischief to be remedied." *Duparquet Huot & Moneuse Co.* v. *Evans,* 297 U.S. 216, 220-21 (1936). Here the inquiry is not philological; it is rather a search for legislative purpose, which is sometimes no more than a quest for a collective will that probably never existed. When the words create a general inclusionary category there is greater reason, perhaps, to accept a literal meaning in the absence of any particular purpose which contradicts it. When the statute is couched in terms of an exception, however, the task is somewhat different, for in the case of an exception we can hardly assume that excluding a particular category from a general class was utterly without purpose. If we find that there was a legislative purpose for the general exception which does not fit the narrower exception at issue, a court may justifiably conclude that the exception at issue is without the statute.

Thus, the normal rule of construction is that where words of exception are used, they are to be strictly construed to limit the exception. *Korherr* v. *Bumb,* 262 F.2d 157, 162 (9 Cir. 1958); see *Piedmont & Northern Ry.* v. *ICC,* 286 U.S. 299, 311-12 (1932); *Midland Cooperative Wholesale* v. *Ickes,* 125 F.2d 618, 626 (8 Cir.), *cert. denied* 316 U.S. 673 (1942); *In re Bay Cities Guaranty Building-Loan Ass'n,* 48 F.2d 623, 624 (S.D. Cal. 1931). As the Court said in *Piedmont & Northern Ry.* v. *ICC, supra,* 286 U.S. at 311-12:

> "The . . . Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

The theme of the Bankruptcy Act is equality of distribution of assets among creditors, *Sampsell* v. *Imperial Paper & Color Corp.,* 313 U.S. 215, 219 (1941); *Buchanan* v. *Smith,* 83 U.S. (16 Wall.) 277, 301 (1873); 3 *Collier on Bankruptcy* ¶ 60.01, at 743; see *Young* v. *Higbee Co.,* 324 U.S. 204, 210 (1945), and correlatively avoidance of preference to some. 1 *Remington on Bankruptcy* § 17, at 34 (5 ed. J. Henderson 1950). The road to equity is not a race course for the swiftest.

We start with the recognition that a foreign corporation which has assets in the United States is generally amenable to bankruptcy here. IBB is such a body under Section 2 of the Act. To find that it is excluded from the general class of entities amenable to bankruptcy one would have to find a reason which illuminates the exception. We can find no convincing reason why a foreign banking corporation, not licensed to do business in the United States, conducting no semblance of a banking business here, and not under the regulatory supervision of any state or federal agency, should not qualify for the benefits of the Act as a voluntary bankrupt.

In reading federal statutes, we must also remember that the statues are written with our federal system in mind. They normally reflect divisions of power between the federal government and the states of the union. Courts over the years have recognized that Section 4 provides for a division of power between the federal government and the states. See *In re Union Guarantee & Mortgage Co.*, 75 F.2d 984 (2 Cir.), *cert. denied*, 296 U.S. 594 (1935); *Woolsey* v. *Security Trust Co.*, 74 F.2d 334, 337 (5 Cir. 1934); *In re Equity Funding Corp. of America*, 396 F. Supp. 1266, 1275 (C.D. Cal. 1975); *In re Supreme Lodge of the Masons Annuity*, 286 Fed. 180, 184 (N.D. Ga. 1923).

So far as Congressional policy can be found for the exclusion of "banking corporations" from the benefit of the Bankruptcy Act, it is this. National banks were always subject to separate federal supervision and regulation, including their liquidation. State banks, chartered by the states, were subject to similar state regulation. No question of voluntary bankruptcy arose under the 1898 Bankruptcy Act, for no corporation *of any kind* was entitled to file a petition for voluntary bankruptcy under that Act. Under the 1898 Act any unincorporated company, as well as corporations of certain types, that is, those "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits," could be adjudged an involuntary bankrupt, however. But national banks and state-chartered banking corporations were excluded. Section 4b of the 1898 Act specifically provided that "[p]rivate bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts." Thus, it was apparently not the circumstance of being in the banking business that controlled, for private bankers were in that business as well. It was rather the existence of federal or state regulation of chartered banks.

This was articulated by the sponsor of the bill, Senator William Lindsay, 30 Cong. Rec. 606 (1897), and by the

Report of the House Judiciary Committee, H.R. Rep. No. 65, 55th Cong., 2d Sess. 40 (1897), which, as the District Judge recognized, "noted the existence of other insolvency provisions as a reason for excluding national banks." 401 F. Supp. at 1164. That report stated:

> "The bill exempts national banks from being proceeded against in bankruptcy, for the reason that Congress has legislated especially in respect to them, and the most careful provisions exist for protecting all interests connected by the national banking laws."

The Conference Committee added the exception for banks incorporated under state law, simply explaining that they "are left to be dealt with by the laws of the State creating them." The inference is that considerations of federalism required that the states be allowed to liquidate as well as to regulate their own creations.

The 1910 amendments for the first time made corporations eligible for voluntary as well as involuntary bankruptcy. Amended Section 4a permitted any "person," which included any corporation "except a municipal, railroad, insurance, or banking corporation," to become a voluntary bankrupt. Similarly, Section 4b was amended to provide that "any moneyed, business, or commercial corporation" could be adjudged an involuntary bankrupt, "except a municipal, railroad, insurance, or banking corporation." The corporations excepted seem to be the same corporations that were excluded from the 1898 Act's provisions. The sponsor of the amendments to Section 4, Congressman Sherley, acknowledged this when he said:

> "There has been excepted out of the law ***always*** certain corporations—for instance, municipal, railroad, insurance, or banking corporations—on the theory that all of those corporations partook either of a public or quasi-public nature that did not warrant their estates being adjudicated through bankruptcy proceedings, and that it was wiser to hold

> them exempt from the law than to permit them to be thrown into bankruptcy by either voluntary or involuntary proceedings. This amendment does not, in that particular, change the law at all."

Hearing on H.R. 18694 Before Subcomittee No. 1 of the House Commitee on the Judiciary, 60th Cong., 2d Sess. (1909) (emphasis added).

This language does not, to be sure, prove that Congress intended to exclude foreign banking corporations from the exception, for they were not the subject of discussion. But the history does tend to explain the exceptions in terms of the considerations of federalism previously mentioned. As this court observed in *In re Union Guarantee & Mortgage Co., supra,* 75 F.2d at 984:

> "The most natural inference is that Congress meant to leave to local winding up statutes the liquidation of such companies; that, since the states commonly kept supervision over them during their lives, it was reasonable that they should take charge on their demise."

We can find no other compelling reason why Congress chose to exempt banks from the benefits of the Act. Even if no statutory scheme for liquidation existed in a particular state, state courts of equity could fill the statutory gap. The distribution of federal-state power was not between a detailed liquidation statute and no statute at all. It was between control by the state, through its courts, of the liquidation of certain quasipublic corporations, and the liquidation of all other corporations through the federal bankruptcy laws.[2]

2. The exception for railroads was doubtless due to the absence from the Bankruptcy Act until 1933 of any provision for reorganization in an industry where liquidation would generally have been considered to be unthinkable because of the public interest in rail transportation, and to the development of the federal equity receivership as an effective mechanism for reorganization.

The District Court concluded in a reasoned opinion, nevertheless, that if Congress intended to exclude from bankruptcy adjudication certain companies for which there was already an extensive regulatory scheme for liquidation, then the liquidation laws and banking laws of foreign countries such as the United Kingdom could serve that objective as well as state schemes could. We think this reasoning elides the essential federalism implicit in the Bankruptcy Act.[3]

It is hardly a cogent argument that a receiver of property may be appointed in a New York State court under § 1202(a)(4) of the New York Business Corporation Law since, if such jurisdiction attached, it would be not because IBB is a "banking corporation," but only because it is a "foreign corporation." And a foreign corporation concededly would be eligible for bankruptcy if it has assets here. The availability of an alternative state remedy is not a good argument for appellees.

This is a case where United States creditors could be harmed if preferential liens were permitted to survive. Despite the speed of communications, the Atlantic Ocean remains as much a barrier to extraterritorial jurisdiction as ever it did. If IBB had been licensed to conduct a banking business in New York and had taken deposits here, it could be argued with some reason that the State of New York, having assumed supervision, should control the liquidation of its assets in New York rather than the Bank-

3. Appellees rely heavily on *Clark* v. *Williard,* 292 U.S. 112 (1934) and 294 U.S. 211 (1935), but this reliance is misplaced. Those cases only held that the full faith and credit clause did not prevent one state from favoring its local levying creditors over a liquidator appointed by another state, insofar as claims to local property were concerned. They were not in any sense an interpretation of the Bankruptcy Act, nor an endorsement of what Justice Cardozo termed "a policy to allow the assets of an insolvent corporation to be torn to pieces at the suit of rival creditors when they could be distributed equally and without sacrifice at the hands of a receiver." 292 U.S. at 123.

ruptcy Court. That is what the New York courts did after the Bolshevik Revolution in the case of Russian insurance companies licensed to do business in New York under the supervision of the Superintendent of Insurance of the State. See, *e.g., Moscow Fire Insurance Co.* v. *Bank of New York & Trust Co.*, 280 N.Y. 286, 299, 20 N.E.2d 758 (1939), *aff'd by an equally divided Court*, 309 U.S. 624 (1940). But IBB was never licensed to do business in New York and was never under the supervision of its Banking Department. There is no statute providing for its liquidation under the aegis of the Superintendent of Banks.

To find IBB to be a "banking corporation" within the meaning of Section 4 would require a "much clearer manifestation of intention than Congress has furnished." *FTC* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 355 (1941) (Frankfurter, J.). Finding no Congressional purpose to command otherwise, we consider IBB not to be a "banking corporation" within the meaning of Section 4a of the Bankruptcy Act. In so doing, we avoid an inequitable result to its creditors, including the other American banks who have lost the race of diligence.

The order dismissing the petition in bankruptcy is reversed.

APPENDIX B

In the Matter of
ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt.

No. 74 Bkcy 1322.

United States District Court,
S. D. New York.
Oct. 10, 1975.

MEMORANDUM

LASKER, *District Judge.*

This bankruptcy appeal raises an issue of first impression, which is of great significance to the international banking community. The economic interdependence among nations and the role of international banking in national and international affairs has evolved dramatically in this century. It is therefore understandable that when Congress in 1898 and 1910 specified in § 4 of the Bankruptcy Act who may and may not be adjudicated a bankrupt, it did not specifically address the question before us: Does the Bankruptcy Court have jurisdiction to entertain a foreign banking corporation's voluntary petition in bankruptcy?

Despite the seeming simplicity of the issue, the question is thorny. As Justice Cardozo shrewdly observed, judicial construction of statutory language presents "a choice between uncertainties." Like Cardozo, "[w]e must be content to choose the lesser." *Burnet* v. *Guggenheim*, 288 U.S. 280, 288, 53 S.Ct. 369, 372, 77 L.Ed. 748 (1933).

I.

The Facts

On September 23, 1974 a voluntary petition in bankruptcy was filed on behalf of Israel British Bank (IBB) and on the same day it was adjudicated a bankrupt.[1] The Bank of the Commonwealth (Commonwealth) and the Federal Deposit Insurance Corporation (FDIC) as successor in interest to Franklin National Bank (Franklin) appeal from the decision or the Bankruptcy Court which denied Franklin's motion to dismiss IBB's petition and sustained the court's jurisdiction over IBB.

IBB is a corporation organized under the laws of the United Kingdom and formerly engaged in banking business with its principal place of business in London. It has never had a place of business, office or agent in the United States; has never been qualified to do business here; and never has done business in this country as a bank. IBB's property in this judicial district consists of deposits in various banks totaling several million dollars. On August 2, 1974, IBB filed a debtor's petition in Great Britain for the winding up of its affairs. Approximately four days later a Provisional Liquidator was appointed to safeguard the bank's property, and on December 2, 1974, the High Court, Chancery Division, of the United Kingdom approved IBB's petition and ordered the winding up of its affairs.

Appellants, FDIC and Commonwealth, are lien creditors of IBB in the amounts of $2,000,000. and $500,000. respectively. Both liens were perfected within four months of the filing of IBB's petition here. Consequently, if IBB is adjudicated a bankrupt under the Bankruptcy Act, a trustee in bankruptcy has the power to void those liens pursuant to § 67(a) of the Act, 11 U.S.C. § 107(a).

---

1. An amended petition, dated October 1, 1974, was filed on October 10, 1974. The parties have stipulated that this appeal be deemed addressed to the amended, as well as original petition.

II.

The Statute

Section 4 of the present Bankruptcy Act, 11 U.S.C. § 22, provides in relevant part:

"§ 22. Who may become bankrupts

> (a) Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this title as a *voluntary bankrupt*.
>
> (b) Any natural person, except a wage earner or farmer, and any moneyed, business, or commercial corporation, excepting a building and loan association, a municipal, railroad, insurance, or banking corporation, owing debts to the amount of $1,000 or over, may be adjudged an *involuntary bankrupt* upon default or an impartial trial and shall be subject to the provisions and entitled to the benefits of this title." (Emphasis added).

According to § 4(a), any person can file a petition as a voluntary petition except certain corporations, including "banking corporations." If IBB falls within the definition of "banking corporations" it may not file a petition; conversely, if the exception does not apply, it may enjoy the benefits of the Act.

In the decision below, Judge Galgay concluded that as a matter of law the term "banking corporation" in § 4(a) does not encompass foreign banks which have no business connection with the United States other than the location of assets here, and that the scope of the exception covers only "national banking corporations and banking corporations created under state and territorial laws." He held that IBB fell outside the scope of the exceptions to § 4(a) and accordingly could be adjudicated a voluntary bankrupt.

Contrary to the position adopted by the Bankruptcy Court and urged by IBB, FDIC and Commonwealth argue

that (1) the legislative history of the Act fails to support the limitation of the exception to domestic banking corporations; (2) application of the exclusion to foreign banks does not frustrate the purposes underlying the "banking corporation" exception; and (3) the court is without power to modify an unqualified exception for "banking corporations" to cover only domestic banks.

III.

The Ambiguity of a Clear Statute

Although the parties devote considerable attention in their briefs to the legislative history of § 4, each side asserts that a mere reading of the statute immediately compels judgment in its favor.

Quite simply, IBB argues that while it was undeniably a bank in Great Britain, it was also quite definitely not a "bank" as such anywhere in the United States, and therefore does not fall within the "banking corporation" exception of § 4(a). The argument does not wash. There is no provision in the Act which states that a foreign corporation must *operate* as a bank within the United States in order either to enjoy the benefits of bankruptcy or to fit within the Act's exceptions, and of course the courts cannot write such a requirement into the Act. The corporations listed in § 4(a)—both those that may be adjudged a bankrupt and those that may not—are described only with reference to the character of the entities, not to the extent, if any, of actual operation. It would be one thing if IBB had never operated as a bank anywhere. But since its corporate activities have indisputedly been in general those of a bank, it cannot avoid being so defined.

Another section of the Bankruptcy Act highlights the fact that the actual business of a corporation in the United

States is unimportant for jurisdictional purposes. According to § 2 of the Act, the Bankruptcy Court has jurisdiction as a general matter over foreign persons and corporations solely on the basis of their having property located in the United States. 11 U.S.C. § 11a(1). The presence of assets —not the corporate activities within this county—is the predicate for jurisdiction over foreign corporations.[2] Indeed, a foreign bank which does extensive banking business within this country is nevertheless subject to bankruptcy adjudication solely on the basis of its assets here if its principal place of business is outside the United States. 11 U.S.C. § 11a(1). There is no authority for IBB's contention and we decline to adopt it.

There is greater appeal in the position of FDIC and Commonwealth that because the term "banking corporations" does not on its face admit of the refinement sought by IBB, no such restriction is permissible except by Congressional amendment.

Reference to the definitional section of the Act is necessary to understand appellant's position. The word "person" is defined in § 1(23) of the Act to include corporations; § 1(8) defines "corporations" to include:

> ". . . all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association . . ."

Thus, the Act allows any corporation including foreign corporations with assets in the United States to file a petition in voluntary bankruptcy except for certain categories of

2. The dispute as to whether § 2(a)(1) is a jurisdictional or venue statute (see, e. g., *Bass v. Hutchins*, 417 F.2d 692 (5th Cir. 1969); *In re Eatherton*, 271 F.2d 199 (8th Cir. 1959)) is irrelevant to the issue at hand because the predicate of jurisdiction if any, in this case is § 4.

corporations, including banking corporations. The term "banking corporation" has been sensibly construed to include "corporations which were authorized by the laws of their creation to do a banking business." *Gamble* v. *Daniel,* 39 F.2d 447, 450 (8th Cir.), *appeal dismissed,* 281 U.S. 705, 50 S. Ct. 464, 74 L.Ed. 1129 (1930). FDIC and Commonwealth argue that a mere reading of § 4(a), together with §§ 1(23) and 1(8) ineluctably lead to the conclusion that a bank such as IBB, authorized under the laws of the United Kingdom to conduct a banking business, squarely falls within the meaning of "banking corporation." According to appellants, the clarity of the statute precludes the need or justification to search elsewhere for a guide to its effect in the case of foreign banks.

IV.

Legislative History

A. A Note on the Propriety of Consulting Legislative History

Despite the admonition by FDIC and Commonwealth that resort to legislative history is unwarranted, courts have not been chary to consider that history if it illuminates even superficially "clear" statutory language. See, e.g., *Lynch v. Overholser,* 369 U.S. 705, 710, 82 S.Ct. 1063, 8 L.Ed.2d 211 (1962); *United States v. American Trucking Associations,* 310 U.S. 534, 543, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940); *Knapp v. McFarland,* 462 F.2d 935 939 (2d Cir. 1972); *Guiseppi v. Walling,* 144 F.2d 608, 624 (2d Cir. 1944) *aff'd sub nom., Gemsco, Inc. v. Walling,* 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921 (1945); *but see, e.g., Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 395-97, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) (concurring opinion) (Jackson, J.); Radin, "Statutory Interpretation," 43 Harv.

L. Rev. 863 (1930) and Landis, "A Note on 'Statutory Interpretation'," *id.* at 886. While the words of a statute are of course the primary tool in divining legislative intent, judicial interpretation is not straitjacketed by those words if the legislative history evidences a purpose or objective at odds with a plain reading of the statute.

> "It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States,* 278 U.S. 41, 48, 49 S.Ct. 52, 54, 73 L.Ed. 170 (1928).

In any event, the debate in this case is largely one of academic interest for a review of the history of § 4 reveals, if nothing else, one stark conclusion: Congress has never considered whether foreign banks are to be treated differently than domestic ones.

B. The History of Section 4

1. The Bankruptcy Act of 1898[3]

Section 4 of the Bankruptcy Act of 1898 (Public Law 171, 55th Congress, 30 Stat. at L. 544, chap. 541), the original predecessor of the present law, provided:

> "Sec. 4. Who May Become Bankrupts.—(a) Any person who owes debts, except a corporation, shall

3. The history of § 4 prior to 1898 may be summarized briefly. Under the Act of 1800 (which was repealed in 1803 (2 Stat. 248)) bankers resident within the United States could be adjudicated involuntary bankrupts, § 1 (2 Stat. 19). The Act made no proviison for voluntary bankruptcy. The next bankruptcy act which was passed in 1841 and repealed two years later, provided in § 1 that resident banks could be adjudged both voluntary and involuntary bankrupts. The most immediate predecessor to the 1898 Act was the Bankruptcy Act of 1867, which also provided that resident banks and bankers, whether incorporated or not, were subject to both voluntary and involuntary adjudication. §§ 3, 9, 11. The Act was repealed in 1878.

be entitled to the benefits of this Act as a voluntary bankrupt.

(b) Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial Laws, may be adjudged involuntary bankrupts."

The act excluded all corporations from becoming voluntary bankrupts. While permitting certain business corporations to be adjudged involuntary bankrupts, the last sentence in § 4(b) excluded even from that category "national banks or banks incorporated under State or Territorial Laws."

As originally proposed, § 4(b) specifically excluded only "national" banks. As the following excerpts from the legislative history disclose, the reason for the exclusion was the existence of other more effective insolvency laws and procedures. The proponent of the bill in the Senate, Senator William Lindsay, explained:

> "There is a law now in force for the control and regulation of national banks, and it was thought best not to interfere with that law. In certain contingencies the government is responsible for the assets of such banks, and it is but reasonable that it should have entire control of them and of their liquidation in cases of dishonesty or insolvency." 30 Cong. Rec. 602, 55th Cong., 1st Sess. (1897).
>
> • • •
>
> "There is already in existence a satisfactory law for the control and liquidation of national banks. Since the Government is responsible for the bank notes issued by these banks in the event of their failure, there is good reason why it should have control of their liquidation." 30 Cong. Rec. 606, 55th Cong., 1st Sess. (1897).

The House Judiciary Committee Report, House Report No. 65, 55th Cong., 2d Sess. (1897) also noted the existence of other insolvency provisions as a reason for excluding national banks:

> "The bill exempts national banks from being proceeded against in bankruptcy, for the reason that Congress has legislated especially in respect to them, and the most careful provisions exist for protecting all interests connected by the national banking laws." *Id.* at 40.

During the debate on the House Floor, Congressman Robert N. Bodine criticized the sweeping scope of § 4(b) and predicted problems which would result if publicly regulated corporations other than national banks were not also excluded:

> "This bill is the first one of its kind to include corporations at all . . . It may be that there is a certain class of corporations that are as appropriately made subject to its provisions as are natural persons [such as those who] engage in any business of the same kind as that usually carried on by individuals. But, this bill goes much further than this. It embraces insurance companies, both fire and life, stock, mutual, assessment, or benevolent; it embraces building and loan associations, trust companies, savings banks, and all other State banks.
>
> "Now, in nearly every State in the Union there are chapters on chapters of the statutes regulating to the smallest minutia the proceedings in case of the insolvency of any of those classes of corporation. . .
>
> "By this bill, at one fell swoop, all the jurisdiction of the several States as to these matters is taken away and vested in the trustee in bankruptcy, and the duties imposed by the State itself upon the officer

of the bankrupt court, to be performed, no doubt, at an expense many fold greater; and if the experience of the past is any criterion, the creditors, the beneficiaries, or depositors, as the case may be, will receive but a pittance, and the funds to which they are equitably entitled will go into the pockets of the court officials.

"Under this bill a trustee in bankruptcy becomes the insurance commissioner, the railroad commissioner, the bank examiner and commissioner and the building and loan commissioner of the several States . . . Heretofore the Federal courts have confined themselves principally to carry on the business of the great railroads of the country; but now it is proposed to enlarge their business, to make them vast department stores, in which everything can be bought and every business conducted, from a railroad down to a peanut stand." 31 Cong. Rec. 1939, 55th Cong., 2d Sess. (1898).

Despite Congressman Bodine's fears, the House passed the bill as reported by the House Judiciary Committee. At the request of the Senate, the bill was referred to a Conference Committee, which added the following sentence to § 4(b):

> "Private bankers, but not national banks or banks incorporated under State or Territorial Laws, may be adjudged involuntary bankrupts."

No explanation for the additional sentence was given by the Committee except for the unilluminating statement that:

> "The great railroad and transportation companies and banks incorporated under any law are left to be dealt with by the laws of the State creating them. It would lead to much confusion and hardship and many complications should we undertake to subject the great railroad and transportation corporations to the provisions of this act. It is believed that they can be better dealt with under other laws." 31 Cong. Rec. 6426 55th Cong., 2d Sess. (1898).

2. Amendments of 1903 and 1910

While Congress amended § 4(b) in 1903, the exclusion of "private bankers . . ." remained unchanged.[4]

However, Congress substantially revised § 4 in 1910. As amended, the section provided:

> "Sec. 4. Who may become bankrupts.—(a) Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.
>
> (b) Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act.
>
> "The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States." (Public Law 294, 61st Congress, 36 Stat. at L. 838, chap. 412).

---

4. Section 4(b) as amended in 1903 (Public Law 62, 57th Congress, 32 Stat.L. 797, Chap. 487) provided:

> "(b) Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, [mining] or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.
>
> [The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States.]" (Additions made by 1903 amendment in brackets).

Under the 1898 Act, no corporation had been eligible to file a voluntary petition. Under the 1910 Act all corporations, except municipal, railroad, insurance or banking corporations, were authorized to do so. Section 4(b) in the 1898 version as amended in 1903 had subjected "any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits" to involuntary bankruptcy. The 1910 amendment instead allowed "any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation" to be adjudged an involuntary bankrupt. Moreover, the provision of the 1898 Act which had provided that "[p]rivate bankers, but not national banks or banks incorporated under State or Territorial Laws" could be adjudicated involuntary bankrupts was deleted.

According to statements made during the floor debate by Congressman Sherley, sponsor of both amendments to § 4, the revision in § 4(b) was intended to clarify what types of corporations could be adjudicated involuntary bankrupts by formulating a comprehensive definition with certain exceptions rather than by enumeration, as in the 1898 Act, of the specific categories of corporations subject to involuntary bankruptcy.

At the hearing before the House subcommittee which considered the amendments, Congressman Sherley referred to those corporations which were excluded by § 4(b) and stated:

> "There has been excepted out of the law always certain corporations—for instance, municipal, railroad, insurance, or banking corporations—on the theory that all of those corporations partook either of a public or quasipublic nature that did not warrant their estates being adjudicated through bankruptcy proceedings, and that it was wiser to hold them exempt from the law than to permit them to be thrown into bankruptcy by either voluntary or

> involuntary proceedings. This amendment does not, in that particular, change the law at all. Now these particular corporations are exempted. What is here proposed is to permit the voluntary filing of a petition by a corporation." Hearing before Subcommittee No. 1 of the Committee on the Judiciary on H.R. 18694 (bankruptcy), Feb. 3, 1909.

In its report on the proposed 1910 amendments, the House Committee on the Judiciary wrote:

> "The words substituted are taken from the bankruptcy law of 1867, and their meaning has long since been settled by the courts. The reason for exempting the quasipublic corporations will be apparent. Banks are excepted from the operation of the law at present. Other business entities having similar responsibilities to the public are now also excepted." House Report 511 (61st Congress, 2d Session) (1910) at 5.

3. The 1932 Amendment [5]

In 1932 building and loan associations were added to the list of corporations excepted from the provisions for voluntary and involuntary bankruptcy. In recommending the bill to the House, the House Judiciary Committee wrote:

> "The purpose of the bill is to exempt building and loan associations from the operation of the national bankruptcy law. When the national bankruptcy law was drafted it was thought wise to exempt from its operation municipal, railroad, insurance, and banking corporations. At that time building and loan associations were not as extensive and through oversight or otherwise these associations were not included in the exemption. Every reason which obtains for exempting the corporations above re-

5. Congress revised the Bankruptcy Act in 1938 and, at that time made certain changes in § 4(b), but none of them were addressed to the "banking corporation" exception.

ferred to obtains in so far as building and loan associations are concerned. . . . It has been suggested that by reason of the fact that in two States in the Union no law exists controlling building and loan associations that this might be a reason for not exempting these associations from the operation of the bankruptcy law. It will be remembered that if the bankruptcy law is not invoked in connection with building and loan associations that this in no way interferes with the State equity laws and whether a State has supervisory control over building and loan associations or not those interested may at all times take advantage of State insolvency laws." House Rep. 98 (72nd Congress, 1st Sess. 1932).

V.

The Import of the History

In sum, the exception for "banking corporations" from the benefits of voluntary bankruptcy was first enacted in those words in 1910, but the policy of excluding banks from aspects of the Act was earlier conceived in the 1898 version of § 4(b). However, unlike the 1898 statute, which expressly accepted national, state or territorial banks from involuntary bankruptcy, the 1910 amendment eliminated any reference to a bank's place of incorporation. To prevail, IBB must therefore demonstrate that, despite the change in language, Congress intended the jurisdictional rule of the earlier statute to survive the 1910 revision. IBB relies on two sources to support this construction: the views of members of Congress and the policies underlying the exception as evidenced in legislative history and as construed by courts.

Specifically, IBB relies upon the statements made by Congressman Bodine in 1898 (see *supra* at [pp. 11-b–13-b]) and Congressman Sherley in 1909 (see *supra* at pp. [12-b–13-b]) as evidence that (1) Congress exempted only national, state and territorial but not foreign banks from involuntary

bankruptcy in 1898; and (2) Congress did not intend the exception to be expanded in 1910 to cover foreign banks. FDIC and Commonwealth object at the outset to giving weight to these statements because the case at hand involves a voluntary petition, and the congressional remarks in question were not addressed to § 4(a) which relates to voluntary bankrupts. In addition, they argue that the phrase "national banks and banks incorporated under State or Territorial Laws" in § 4(b) of the 1898 Act never modified the exception for "banking corporations" in § 4(a) of that statute. FDIC and Commonwealth consequently argue that the history of and reason for the specific reference to national, state and territorial banks in the exceptions to involuntary bankruptcy is only tangentially relevant to the construction of the banking exception for voluntary bankruptcy.

Although the history outlined above is correctly stated, we disagree with the conclusion that appellants draw from it. The exception in the present Act for "banking corporations" is identical in §§ 4(a) and (b). Whatever the helpfulness of maxims of construction in general, common sense dictates that the same words used in different parts of the same statutory provision should, absent evidence to the contrary, be accorded the same meaning. See *Davies Warehouse Co.* v. *Bowles,* 321 U.S. 144, 149-159, 64 S.Ct. 474, 88 L.Ed. 635 (1944). Therefore, if the exception in § 4(b) only covers national, state and territorial banks, that fact is relevant to the determination whether foreign banks are covered under § 4(a).

A. Congressman Bodine's Fears

IBB first points to the statement in 1898 of Congressman Bodine advocating the exclusion of "trust companies, savings banks, and all other State banks" from § 4(b) to avoid interference with state regulation of these institutions. (see *supra* at pp. [11-b–13-b]) IBB argues that Con-

gressman Bodine's comments evidence a concern only that state, as distinct from foreign, banks be excluded from the Act and that he was unconcerned with the question whether foreign banks could be adjudicated involuntary bankrupts. According to IBB, when the Conference Committee added the phrase excluding state or territorial banks to § 4(b), it "apparently accepted Congressman Bodine's position." (IBB Memorandum at p. 24) IBB concludes from this that Congress did not mean to exclude foreign banks.

We do not draw the same conclusion. For one thing, because the Congressman did not consider foreign banks at all, his statements shed no light on the issue. Moreover, it is not even clear that Congressman Bodine's attitude towards state banks was accepted by Congress as a whole. As Dean Sovern has pointed out in "Section 4 of the Bankruptcy Act: The Excluded Corporations,"

> ". . . It might be argued that Congress left the insolvency administration of banking and insurance corporations and building and loan associations to state law for the reasons suggested by Mr. Bodine, that '[I]n nearly every State in the Union there are chapters on chapters of the statutes regulating to the smallest minutia the proceedings in case of the insolvency of any of those classes of corporations.' . . . *The argument suffers badly from the lack of evidence in the history of section 4 that the rest of Congress shared Mr. Bodine's views.*" 42 Minn.Law 171.180 (1957) (emphasis added).

Moreover, Congressman Bodine was neither the sponsor of the 1898 Act in the House nor a member of the committee which drafted the legislation. There is no reason to view the statement as other than to view the statement as other than he view of one Congressman.[6]

6. The Supreme Court and commentators have suggested that expression in debate by individual legislators (other than the member in charge of the bill) should be disregarded. See *United States*

B. The Import of Congressman Sherley's Statement

IBB place great emphasis on Congressman Sherley's statement that the 1910 amendment to § 4(b) did not "change the law [regarding excepted corporations] at all" as "crucial evidence" that Congress implicitly deemed the term "banking corporations" to include only national, state or territorial banks. (see *supra,* pp. [12-b–13-b]).

However, even assuming that IBB interprets Congressman Sherley's statement correctly to mean that the exception in the 1910 Act was intended to have the identical effect of its 1898 predecessor, this view is beneficial to IBB's position only if the effect of the 1898 exception was itself limited to national, state and territorial banks. Unfortunately, a close analysis of that Act does not produce a clear cut answer.

We start with the language of § 4(b) of the 1898 Act which specifies what entities can be adjudicated involuntary bankrupts. *Un*incorporated companies could be adjudged involuntary bankrupts regardless of the nature of their businesses. However, in the case of corporations, only those "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits" fell in that category, and of course, even IBB does not suggest that banks are principally engaged in manufacturing, printing or publishing. Although Congress did not define the terms "trading" or "mercantile pursuits," IBB does not contend that banks operate in those fields and, indeed, the decisions in *Zugalla* v. *International Mercantile Agency,* 142 F. 927 (3d Cir. 1906), *In re Surety Guarantee & Trust Co.,* 121 F. 73 (7th Cir. 1902), and *In re New York & W. Water Co.,* 98 F. 711 (S.D.N.Y.) *aff'd* 102 F. 1004 (2d Cir. 1900) are

v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290, 318, 17 S.Ct. 540, 41 L.Ed. 1007 (1897); Ten Broock, "Admissibility of Congressional Debates in Statutory Construction by the United States Supreme Court," 25 Calif.L.Rev. 326 (1937). Even if the rule is more honored in the breach, the caution it counsels is wise.

consistent with the view that they did not.[7] Thus, it is plain that no banking corporation could be adjudged an involuntary bankrupt under the 1898 Act (see *Murphy* v. *Penniman,* 105 Md. 453, 469, 66 A. 282 (1907)) unless, as IBB argues, the *exclusionary* language of § 4(b) in 1898 leads to a different conclusion.

One is therefore left to grapple as at the outset with the meaning of the last sentence of § 4(b) of the 1898 Act:

> "Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts."

If the analysis above as to the *inclusionary* language in § 4(b) is correct, this final sentence is rendered mere surplusage. Interpretations offered by each side as to the reason for its inclusion do not detract from the persuasiveness of this view, for if all banks were outside the scope of the *inclusionary* language of § 4(b), specification of only certain types of banks in the *exclusionary* language of the section adds nothing to the effect of the statute.

The question ought not be settled on such an uncertain basis, if any firmer ground exists. Moreover, we are loath

7. See also *In re New York Building-Loan Banking Co.,* 127 F. 471 (S.D.N.Y. 1904) where the court held that because the debtor did not fit within the enumerated classes of included corporations it was not subject to the Act, and stated:

> "The authorities under the present act seem decisive. They hold, in substance, that the intention of the present bankrupt act, the provisions of which are much more restrictive than those of the earlier bankrupt acts, was to exclude from the operation of the act banks, railroad, telegraph and express companies, and all corporations except those mentioned in the act. By the provisions of the present act the corporations which can be put into involuntary bankruptcy are those 'engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits.' These terms are to be taken in their natural and usual meaning, and any corporation which does not come within such meaning cannot be put into bankruptcy. I think that an ordinary building and loan association is not a corporation which is included in the provision quoted." 127 F. at 471-72.

to decide a case as important as this on whatever conclusions IBB would have us draw from an isolated comment made by a single Congressman, even one who sponsored the bill.[8] Furthermore, we note the irony of IBB's position which depends on that portion of § 4(b) which specifies who may *not* be adjudged an involuntary bankrupt in order to demonstrate who *may*. Such an analysis is especially weak where, as here, so little meaningful history is to be found. IBB argues that non-inclusion in an exclusion results in inclusion. That is, it contends that the failure to include foreign banks in the sentence which excludes national, state and territorial banks results in the determination that foreign banks are among the types of corporations who may be adjudged involuntary bankrupts. But this syllogism runs crashing into the hard, clear language of the coverage clause of § 4(b) which simply does *not* authorize the involuntary bankruptcy of a bank.

The plain fact is that the legislative history offers no clue why Congress inserted the limitation as to national, state and territorial banks, and appellants' suggestion that the phrase is mere surplusage is no more than an educated guess.

In sum, none of the theories urged by either side obviates the fact that there is no indication that Congress, either in 1898 or 1910, considered the effect of the exception as to foreign banks. We therefore proceed to consider the policies underlying the exception to determine whether its application to foreign banks would further or would thwart the objectives of the statute.

8. Unlike Congressman Bodine in 1898, Congressman Sherley was the sponsor of the 1910 bill in the House and his statements should not "be dismissed out of hand" as ones reflecting only his view. *United States* v. *Enmons,* 410 U.S. 396, 405 n. 14, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973). However, the teaching of Justice Frankfurter that judges "not delve into the mind of legislators or their draftsmen, or committee members" is nevertheless apt. Frankfurter, "Some Reflections on the Reading of Statutes," Col. L. Rev. 527, 539 (1947).

VI.

The Purposes of the Exception

A. Existence of Alternate Regulation

A variety of courts which have considered the exceptions to § 4 of the 1910 Act have concluded that Congress excepted railroads, municipal, insurance and banking corporations because of the existence of pervasive state regulations over these activities.

For example, as the court in *Woolsey et al.* v. *Security Trust Co.,* stated:

> "The letter of that section excludes banking and insurance corporations; its spirit and purpose, to leave the liquidation or the banking corporations of the country to the well-organized departments of the states and the nation organized for the purpose of supervising while they are going concerns and of liquidating them when they are not, excludes them. *Federal laws provide elaborately for the supervision and liquidation of national banking corporations; the laws of the states do the same for state banks and insurance companies, in order to protect the millions of persons who deal with them on the faith of the protection afforded by direct governmental supervision and control.* It was considered that it would be a ruinous thing to the state, to the depositors, and to the creditors to have the elaborate scheme of liquidation which the state provides broken into and nullified by bankruptcy proceedings, and it was intended, by withdrawing jurisdiction over these corporations from the bankruptcy court, that this would not occur. It would be directly contrary to the purposes so definitely and comprehensively expressed, to exempt banking corporations from the act, leaving their administration and liquidation to the state and federal systems devised expressly for them, to hold that this bank and trust company is not exempt, chartered though it was under the state banking

> laws, with banking privileges and powers, operated though it was under those laws, and now being liquidated, as it is, under them." 74 F.2d 334, 337 (5th Cir. 1934). (Emphasis added).

Although the Court of Appeals for this Circuit admitted in *Union Guaranty & Mortgage Co. v. Van Schaick, Supt. of Ins.,* 75 F.2d 984 (2d Cir. 1935) that "The purpose of the exception is not self evident; we must infer it as best we can from such similarity as exists between the excepted groups," it nevertheless observed that:

> "The most natural inference is that Congress meant to leave to local winding up statutes the liquidation of such companies; that, since the states commonly kept supervision over them during their lives, it was reasonable that they should take charge on their demise." *Id.*

And in *In re Island Mortgaging Corp.,* 18 F.Supp. 448, 449 (E.D.N.Y.1935), the court remarked:

> "Congress has seen fit to exclude from the operation of the Bankruptcy Act certain types of corporations which, because of their quasi public nature, were assumed to belong wholly under state supervision and control."

As recently as April of this year, the district court in *In re Equity Funding Corp. of America* considered the exception for insurance companies and analyzed the Congressional purpose in excluding insurance companies in terms logically applicable to banking corporations:

> "Congress in enacting Section 4 decided that liquidation of insurance companies should be left to the states. *In Re Union Guarantee & Mortgage Co.,* 75 F.2d 984 (2d Cir. 1935); *In Re Supreme Lodge of the Masons Annuity,* 286 F. 180, 184 (N.D.Ga.1923). Since the reorganization of an insurance company or its adjudication as a bankrupt under the Act would

preempt state liquidation proceedings for that company, Congress enacted Section 4 to preserve the exclusive jurisdiction of the states over the liquidation of insurance companies and to prevent the reorganization of insurance companies or their adjudication as bankrupts. *See Woolsey v. Security Trust Co.*, 74 F.2d 334, 337 (5th Cir. 1934).

By preserving state liquidation proceedings, Congress sought to prevent bankruptcy or reoganization courts from interfering with comprehensive state insurance regulations with the rights of those insured protected by such regulations. *See In Re Union Guarantee & Mortgage Co., supra; In re Superior Lodge of the Masons Annuity, supra.* As the language of Section 4 suggests, Congress determined that interference with state insurance regulations would not occur as long as bankruptcy courts did not reorganize insurance companies or adjudge them to be bankrupts." 396 F.Supp. 1266 at 1275 (C.D.Cal. April 11, 1975).

See, in general, C. Seligson and L. King, "Jurisdiction and Venue in Bankruptcy", 36 *Journal of the National Assoc. of Referees in Bankruptcy,* 38.

Comments by Congressman Bodine (see *supra,* at pp. [11-b–13-b]) and other legislators during debate on the 1898 Act support the view that Congress considered the existence of alternative regulatory mechanisms a reason for excluding national, if not state and territorial banks. See, *e.g.*, 30 Cong. Rec. 606 (1897). However, as Dean Sovern has noted, while "[t]here is slight support in the deliberation preceding the passage of the Act in 1898, and in the debate preceding the exemption of building and loan associations [for the theory that Congress excepted the corporations because of alternate state regulation]", there is

> "[H]ardly enough to sustain the proposition that Congress excluded banks, insurance corporations and building and loan associations primarily because

> they were so extensively regulated by the states. The argument suffers, too, from Congress' failure to exclude all closely regulated enterprises from bankruptcy." 42 Minn.L.Rev. *supra* at p. 180.

Moreover, if a desire to bequeath the regulation of banks to the states was one of Congress' objectives, the statutory scheme did not consistently achieve that result because in 1898 not every state or territory had enacted laws for the control and liquidation of banks. (*E.g.*, Texas, see Gen.L. Tex. 1st Sess. Ch. 10 (1905); Washington, see Washington Code Ann. Title 41 (1912)). Indeed, some courts held that the absence of a state regulatory mechanism was irrelevant. For example, in *In re Oregon Trust & Savings Bank,* the court noted:

> "Under the statutes of the state of Oregon provisions are made for forming corporations, and by virtue of such laws, therefore, corporations might be and are frequently formed for carrying on a banking business. The organization of banks, therefore, comes within the purview of the statutes, and *it does not seem to me that it makes any difference as to the effect of the law that no particular laws were made until recently for the regulation of banks organized under the laws of the state.* The banks are, nevertheless, organized for the purpose of carrying on a banking business, and hence such corporations come within the intendment of that clause of the bankruptcy act which has been theretofore alluded to, and therefore are not subject to be adjudged involuntary bankrupts." 156 F. 319, 320 (D. Or. 1907). (emphasis added).

Further support for the view that Congress did not regard alternative regulation as the *raison d'etre* for the exceptions is found in the language of the House Report on the 1932 amendment which added building and loan associations to the list of excepted corporations:

> "This legislation is sponsored by the United States Building and Loan League, and so far as the committee has been able to ascertain no one connected with building and loan associations opposes this legislation. However, it has been suggested that by reason of the fact that in two States in the Union no law exists controlling building and loan associations that this might be a reason for not exempting these associations from the operation of the bankruptcy law. It will be remembered that if the bankruptcy law is not invoked in connection with building and loan associations that this in no way interferes with the State equity laws and whether a State has supervisory control over building and loan associations or not those interested may at all times take advantage of state insolvency laws." (House Report 98, 72d Cong., 1st Sess. 1932)

If state regulation was indeed the motivation behind the banking corporation exception, then Congress was inconsistent in permitting private bankers to be adjudicated involuntary bankrupts in 1898, since allowing such an adjudication did in fact interfere with state regulation. In *In re Salmon & Salmon*, 143 F. 395 (W.D.Mo.1906) the court refused to give effect to state laws governing the winding up of a private bank owned by a partnership on the grounds that the operation of the state statute was preempted by the Bankruptcy Act. See also *In re Faour*, 72 F.2d 719 (2d Cir.), *cert. denied*, 293 U.S. 613, 55 S.Ct. 143, 79 L.Ed. 703 (1934); *In re Bajardi*, 9 F.2d 797 (2d Cir.), *cert. denied*, 270 U.S. 651, 46 S.Ct. 351, 70 L.Ed. 781 (1926); *accord*, *State of Missouri v. Angle*, 236 F. 644 (8th Cir. 1916).[9]

Furthermore, if Congress intended to exclude from bankruptcy adjudication certain companies for which there was

9. There was a similar interference with state regulatory schemes in the insurance area prior to the 1938 deletion of "any unincorporated company" from Section 4b. *See Republic Underwriters v. Ford*, 100 F.2d 511 (5th Cir. 1938); *In re Minnesota Insurance Underwriters*, 36 F.2d 371 (D.Minn. 1929).

already an extensive regulatory scheme for liquidation, the liquidation laws and banking laws of foreign countries such as the United Kingdom could serve that objective as easily as state schemes.

In any event, appellants argue that New York[10] has enacted ample statutory provisions to cover bankrupts such as IBB. They point out that foreign banks doing business in New York are subject to the regulations of state authorities. *E.g.*, N. Y. Banking Law § 200 *et seq.* If these banks become insolvent, liquidation proceedings may be pursued and a state official may acquire possession of the bank's business for the protection of creditors. *E.g.*, N. Y. Banking Law § 605 *et seq.* IBB responds that these statutes are ineffective as to it because it never carried on banking business here. In such a situation, formal liquidation proceedings may not be authorized by statute, but New York Business Corporation Law § 1202(a)(4) provides that a receiver of the property of the corporation can be appointed by the court in the following situation, which presumably applies to IBB:[11]

> "An action to preserve the assets in this state, of any kind, tangible or intangible, of a foreign corporation which has been dissolved, nationalized or its authority or existence otherwise terminated or cancelled in the jurisdiction of its incorporation or

10. Appellant did not cite statutes of other states although they contend that the liquidation of IBB would be supervised by the laws of other states as well.

11. Section 1202(a)(4) of the Business Corporation Law and its predecessor have been applied to foreign banks with assets in New York. See, *e.g.*, *Stephen v. Zivnostenka Banks*, 31 Misc.2d 10, 155 N.Y.S.2d 340 (1956), *aff'd* 2 A.D.2d 958, 157 N.Y.S.2d 903, *aff'd*, 2 A.D.2d 958 157 N.Y.S.2d 904, *aff'd*, 3 N.Y.2d 862, 166 N.Y.S.2d 309, 145 N.E.2d 24 (1957), *appeal dismissed*, 356 U.S. 22, 78 S.Ct. 560, 2 L.Ed.2d 578 (foreign bank had been nationalized); *Augstein* v. *Banksa A. Hutui Akciova Spolecnost*, 124 N.Y.S.2d 446, *modified on other grounds*, 282 *App. Div.* 929, 125 N.Y.S.2d 647 (1963); (foreign bank had been nationalized).

> which has ceased to do business, brought by any creditor or shareholder of such corporation or by one on whose behalf an order of attachment against the property of such corporation has been issued."

B. Other Objectives Underlying the Banking Exception

Purposes other than that of alternative state regulation have been suggested as prompting the enactment of the banking corporation exception. In holding that a fraternal organization was not subject to the Act as an insurance corporation, the court in *In re Supreme Lodge of the Mason's Annuity* stated that while "No reasons for making these exceptions [for municipal, railroad, insurance or banking corporations] were assigned by the committees of Congress," three reasons other than that of alternate state regulation "might be surmised":

> (1) "the public or quasi public nature of the business, involving other interests than those of creditors";
>
> (2) "the desirability of unarrested operation"; and
>
> (3) "the inappropriateness of the bankruptcy machinery to their affairs." 286 F. 180, 184 (N.Ga. 1934).

Remarks by Congressman Sherley and statements in the 1910 House Judiciary Report (*supra* at pp. [12-b–13-b]) support the theory that the quasi-public nature of the exceptions was a common basis of their enactment. As the Second Circuit has noted:

> "All except municipalities are companies for profit whose businesses are now generally regarded as 'affected with a public interest'; that is to say, as touching enough persons who must deal with them at some economic disadvantage, to require public supervision and control." *Union Guaranty & Mtge Co. v. Van Schaick, supra,* 75 F.2d at 984.

Accord, In re Island Mortgaging Corp., supra; In re National Mortgage Corporation, 17 F.Supp. 54, 55 (D.N.J. 1935); *In re Prudence Co., Inc.,* 10 F.Supp. 33, 39 (E.D.N.Y.) *aff'd,* 79 F.2d 77 (2d Cir.), *cert. denied sub nom. Egbert v. Callaghan,* 296 U.S. 646, 56 S.Ct. 247, 80 L.Ed. 459 (1935); see *In re Equity Funding Corp. of America, supra; Columbia Ry. Gas & Elec. Co. v. South Carolina,* 27 F.2d 52, 55 (4th Cir. 1928).

It is true that in the case of each type of excluded corporation, Congress might well have determined, first, that social and economic interests deserved greater consideration than the interest of equality of distribution among creditors that the Bankruptcy Act in general seeks to achieve; and second, that regulation by states was more appropriate. But if Congress understood the importance of maintaining confidence and stability in the banking system, that concern does not logically demand the creation of a distinction between domestic and foreign banks, given the existence of alternate schemes of regulation of foreign banks by other countries such as here, the United Kingdom.

Turning to the next suggested objective—the desirability of unarrested operation in order to maintain confidence in the institution and in the economy in general—it is logical that Congress might have desired to avoid closing a major bank upon its becoming insolvent if there was any practical way to transfer the banking business of that corporation to a solvent corporation without cessation of operation. The recent memory of the bankruptcy of Franklin National Bank is testimony that such a consideration is of continuing importance. However, no reason suggests itself why the same consideration would not be of equal significance in the case of a foreign bank with assets, creditors or depositors here.

As to the last purpose enumerated by the court in *In re Supreme Lodge,* that is, that the bankruptcy machinery is

inappropriate to winding up the affairs of a bank, the argument applies with equal force both to domestic and foreign banks. Moreover, if the process of bankruptcy under the Act is ill suited for winding up of the affairs of a bank with a large number of creditors, neither in 1898 nor in 1910 did Congress view this problem as a stumbling block in the case of private banks, which might have as many creditors as corporate banks but which could nevertheless be adjudged involuntary bankrupts in 1898.

We conclude that there is nothing inherent in the probable objectives of Congress which requires or suggests that the exclusion of "banking corporations" from the coverage of the Act should apply to domestic but not foreign banks.[12]

VII.

Equitable Considerations

IBB argues that in view of Congress' failure to give the slightest consideration to foreign banks and the dearth of authority to support the position of either side, § 4 should be construed to achieve the "equitable" objectives of the

12. Nor do we find any basis for distinguishing between banking corporations which are actively engaged in banking and those which are not. Even if it may be argued that the objectives of deferring to state regulation, or maintaining the continuity of operations of a bank are more clearly applicable to corporations actively engaged as banks then those which are not, the Act simply makes no such distinction as to domestic banks.

Perhaps all that a sustained effort to find the "meaning" of the statutory language at hand proves is that, as one astute observer has commented:

> ". . . overemphasis on legislative guides may lead to a distorted view of the statutory purpose no less than literalism, for much less thought is spent on the future implications of committee reports and explanations on the floor than in choosing the words of a statute . . ." A. Cox, "Judge Learned Hand and The Interpretation of Statutes," 60 Harv.L.Rev. 370, 381 (1947).

Bankruptcy Act, that is the generally equal distribution of assets among creditors. As stated earlier, both Franklin, FDIC's predecessor in interest, and Commonwealth filed liens within four months of IBB's petition. If the bankruptcy court has jurisdiction, the liens may be invalidated. To recognize the priority of FDIC and Commonwealth, IBB argues, would give them an advantage over foreign creditors in derogation of Congress' intention to ensure generally equal distribution among creditors.[13]

We agree with FDIC and Commonwealth that this argument presupposes jurisdiction under the Act and is of no relevance to the initial determination whether jurisdiction exists. The purpose of enacting the exceptions in § 4 was not to achieve equality of distribution, but to avoid application of the bankruptcy laws to what Congress viewed as inappropriate situations.

VIII.

Conclusion

Despite the variegated mechanisms available to interpret legislation, "the final rendering of the meaning of a statute is an act of judgment."[14] Where scrutiny of the legislative history unearths no clue that Congress has considered application of the statute to the particular facts at hand and where adherence to the statutory words themselves does not frustrate the general objectives of the legis-

13. See *Disconto Gesellschaft v. Umbrecht*, 208 U.S. 570, 582, 28 S.Ct. 337, 341, 52 L.Ed. 625 (1908) in which the Supreme Court noted ". . . the well recognized rule between states and nations which permits a country to first protect the rights of its citizens in local property before permitting it to be taken out of the jurisdiction for administration in favor of those residing beyond its borders."

14. Frankfurter, "Some Reflections on the Reading of Statutes," *supra*, 30 Harv.L.Rev. at 531.

lation, the words must be given effect as they read. Here the words of the statute read:

> "(a) Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this title as a voluntary bankrupt."

and must in the circumstances be taken to mean what they say: that foreign banking corporations are precluded from seeking adjudication as voluntary bankrupts.

In reaching this conclusion we make no attempt to pronounce what Congress' action might have been had it ever considered whether foreign banks should be accorded the right to file voluntary petitions. To do so would be to rush in where angels fear to tread. As Justice Frankfurter wisely advised:

> "To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities . . . Various considerations of parliamentary tactics and strategy might be suggested for the inaction of . . . Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering v. Hallock,* 309 U.S. 106, 119, 121, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940).

The decision of the Bankruptcy Court is reversed. The petition of Israel British Bank is dismissed.

It is so ordered.

APPENDIX C

In the Matter of
ISRAEL-BRITISH BANK
(LONDON) LIMITED

Bankrupt
In Bankruptcy No. 74 B 1322

S.D. N.Y.
December 19, 1974

JOHN J. GALGAY,
Bankruptcy Judge

OPINION

On September 23, 1974, a voluntary bankruptcy petition was filed in this court on behalf of Israel British Bank (London) Ltd (IBB) and on the same date it was adjudicated a bankrupt. An amended petition dated October 1, 1974 was filed on October 10, 1974, containing identical allegations as those in the original petition, the only difference being that the amended petition contained the verification of the Provisional Liquidator of Bankruptcy proceeding commenced in the United Kingdom on August 2, 1974.

On September 26, 1974, Franklin National Bank and the Bank of the Commonwealth filed motions to vacate the adjudication of bankruptcy made upon the filing of the voluntary petition of IBB and to dismiss the voluntary petition of IBB filed on September 23, 1974 upon the ground that this court lacks jurisdiction over the subject matter of the proceedings under the provisions of Section 4a of the Bankruptcy Act.

A conference on scheduling and briefing was held by this court on September 30, 1974. Briefs were submitted by all parties prior to oral argument on the aforesaid motions and the arguments were heard on October 22, 1974.

On the papers submitted and on oral argument, two questions are presented.

1) Do lien creditors who obtained their liens by attachment against the property of the bankrupt within four months of the filing of a voluntary petition have standing to contest such petition?

2) Does the exclusion of a "banking corporation" in Section 4 of the Bankruptcy Act extend to a foreign banking corporation?

Background

According to Franklin's papers its interest in this proceedings [*sic*] arises out of IBB's failure to repay on July 11, 1974 the principal and interest of more than $2,100,000 owing on a Euro-dollar loan or deposit made to it by Franklin. On July 26, 1974, Franklin filed a complaint in the United States District Court for the Southern District of New York captioned *Franklin National Bank* v. *Israel-British Bank (London) Ltd,* 74 Civ 3232, seeking payment of this Euro-dollar deposit.

On the same date Franklin obtained an Order of Attachment which was served on a number of banking institutions in New York City in connection with its suit. IBB failed to plead in Franklin's suit and was in default prior to the filing of its petition herein. Franklin however has been stayed from proceeding to judgment and execution by the filing of IBB's petition.

According to the papers submitted by Bank of the Commonwealth, a banking corporation organized and existing under the laws of the State of Michigan, it loaned IBB $500,000 U.S. Dollars on April 16, 1974, payable on July 15, 1974 with interest at the prime rate plus 1%. On July 22, 1974 when the loan remained unpaid, it commenced an action in the United States District Court, Southern District of New York, Docket No. 74 Civ 3101 (CTG) for the recovery of money loaned plus interest. On the same day it obtained an Order of Attachment in the sum of $515,385.42 plus probable interest. The Order of Attachment was served

on a number of garnishees and attachments made thereunder.

On August 6, 1974 personal service of Summons & Complaint was made on IBB in London and affidavits of service filed in this court. Upon the failure of IBB to appear or answer, the Bank of the Commonwealth obtained a judgment in the sum of $519,923.90 which was entered in this court on September 11, 1974. Execution was levied by a deputy U.S. Marshal on assets of IBB previously attached. However, before the Bank of Commonwealth could compel payment of the monies levied upon, IBB filed its unverified voluntary petition in bankruptcy on September 23, 1974.

Against this background, the motions of Franklin and Commonwealth were filed and the two questions previously noted arise.

Facts

IBB is a corporation organized under the laws of the United Kingdom and engaged in the banking business with its principal offices in the United Kingdom.

On August 2, 1974, pursuant to the Bankruptcy Act of the United Kingdom, petitioner voluntarily filed a debtor's petition for the winding up of its affairs with the High Court, Chancery Division of the United Kingdom.

On or about August 6, 1974, a receiving order was made by the High Court, Chancery Division of the United Kingdom, constituting Arthur Thomas Cheek, Senior Official Receiver, Receiver and Provisional Liquidator of the property of petitioner.

Petitioner has had its principal place of business and its principal assets in London, United Kingdom, and has never had any place of business or its principal assets in this District or any other District of the United States for the preceding six months or for longer portion thereof.

Petitioner has property in this District in the form of deposits of money held by five banks in New York City.

Counsel for petitioner has represented to this court that petitioner never did business in the United States, never was licensed to do business in the United States, never qualified to do business in the United States, never had an office in the United States and never had an agent in the United States. These representations are uncontroverted by the moving parties.

Neither of the moving parties has made a motion to intervene pursuant to Rule 24, F.R. Civ.P., Bankruptcy Rule 724 and Bankruptcy Rule 121 and the court has made no order previous hereto permitting intervention.

As to the first issue raised in the proceeding, i.e., whether or not creditors have standing to contest the adjudication following the filing of the petition and to move to dismiss the same, this court decided at the oral argument that Franklin and Commonwealth had such standing. It is true that the statute does not speak directly to this issue, however, the cases make it clear that creditors have such standing in the very limited areas which involve fraud or a challenge to the subject matter jurisdiction of the court. *Chicago Bank of Commerce* v. *Carter,* 61 F.2d 986 (8th Cir. 1932). *In re*: *Ettinger,* 76 F.2d 741 (8th Cir. 1935); *Mulligan* v. *Federal Land Bank of Omaha,* 129 F.2d 438.

Should there be error in that conclusion, the court has the right to raise the question of subject matter jurisdiction *sua sponte* and for the purpose briefing and arguing the questions, it can request the creditors to appear as *amicus curiae, In re: Ettinger (supra).*

Franklin and Commonwealth each challenged the court's subject matter jurisdiction and out of caution, the court acting *sua sponte,* invited them to argue the question as *amicus curiae.*

As to the second issue, IBB has property within the jurisdiction of this court. It is a foreign banking corporation that has not qualified to do business in the United States or in any of the states thereof and never had a place of business therein.

It appears from the foregoing that Section 2a(1) of the Bankruptcy Act and Rule 16a(2)(b) of the Rules of Bankruptcy Procedure vests this court with jurisdiction over IBB provided the proper person invoked the jurisdiction of the court and further, provided that it does not come within the exception of "banking corporation" contained in Section 4a of the Bankruptcy Act.

Counsel for the petitioner has submitted what he contends to be the authority under the law of the United Kingdom to the effect that the Provisional Liquidator in the British proceedings has authority to act for the corporation in filing the voluntary petition in this District. He further volunteered that if it became necessary, ratification by the Board of Directors of the IBB could be obtained to obviate any question of authority to file the petition under *In re: Jefferson Casket Co.* which relates to general corporation law of the State of New York—25 ABR 663. He submitted the exchange of telegrams reciting this court's question to him regarding the authority to file the instant voluntary proceeding and the British counsel's reply. There was also submitted the Order of the High Court of Justice, Chancery Division, Companies Court appointing one of the official Receivers attached to the court to be Provisional Liquidator of IBB dated August 6, 1974. Also submitted was an Order of the same court entitled "Leave to Employ Attorneys" dated October 9, 1974. That order authorized the employment of Krause, Hirsch & Gross of New York "to act for said company (IBB) and to investigate and report to the Official Receiver—and to take such steps and to institute such proceedings including the filing of a bankruptcy petition against the company as they may advise and as the said Official Receiver may authorize them to take to insure that the assets of the said company

situated in the United States of America become available for the benefit of creditors general." Copies of this material were furnished to the moving parties and remains uncontroverted.

On the basis of the record before me I am satisfied that the filing of this voluntary petition is properly authorized by the Court in the United Kingdom.

I conclude as a matter of law that IBB as a foreign banking corporation that had not qualified to do business in the United States or in any state therein, and that never had a place of business there, is not exempted from and is entitled to the benefits of the Bankruptcy Act as a voluntary bankrupt.

In reaching this conclusion reference to legislative and statutory history is necessary and relevant in determining the meaning of the language of Section 4a in the present Act. *Boston Sand & Gravel* v. *United States,* 278 U.S. 41 (1928). Simply put, the question is, did Congress intend to include within the exception of "banking corporation" in that section, foreign banking corporations as well as domestic banking corporations.

This court is persuaded that the legislative history supports the conclusion that Congress intended to exclude from the scope of the Act only national banking corporations and banking corporations created under state or territorial laws and therefore foreign banking corporations in the position of the petitioner are not excepted from the Act.

The legislative history of the Bankruptcy Act of 1898 and the modifications of Section 4 thereof in 1903 and 1910 demonstrates that Congress intended to except from Section 4 only those entities whose insolvency was covered by specific Federal and State law. This exclusion applies to "municipal, railroad, insurance or banking corporations." However, foreign banking corporations which are not subject to specific State and Federal banking laws, are not

among the excluded categories. An examination of congressional intent through the history of the words of the exception to Section 4 supports the view that the exclusion from Section 4 applies only to domestic corporations.

Section 4(b) of the Act of 1898 specifically excluded "national banks or banks incorporated under State or Territorial Laws" from the benefits of filing an *involuntary* petition. (Public Law 171, 55th Cong., 30 Stat. L. 544, Chap. 541). During the debate over the amendments of 1903, Congress refrained from re-examining its exception of national, state and territorial banks. (36 Cong. Rec. 1035, 57th Cong. 2nd Sess. (1903). However, in 1910, when Congress redrafted Section 4, allowing corporations to file a voluntary petition in bankruptcy under Section 4a, the exception, to both 4a and 4b was restated to read, "except municipal, railroad, insurance or banking corporation[s]." This change in language as stated by the sponsor of the amendment "did not, in that particular case, change the law at all." (Statement of Congressman Sherley in hearing before sub-committee No. 1 of the Committee on the Judiciary in H.R. 18694 (Bankruptcy) February 3, 1910 at 4). Thus, it can be concluded, that the exclusion of banking corporations remain limited to national, state and territorial banks as before. The 1910 amendment does not imply an extension of the exclusion to foreign banking corporations. The exception to Section 4 is based on two factors. First, the entities excluded are public or quasi-public in nature and are clearly affected by a public interest. Secondly, there are specific provisions in either federal or state laws for the liquidation of such entities outside of the Bankruptcy Act. See statement of Sen. William Lindsay, 30 Cong. Rec. 602, 606, 55th Cong. 1st Sess. (1897) and the statement of Congressman Bodine on the United States Senate Floor, 31 Cong. Rec. 1939, 55th Cong. 2nd Sess. (1998). The conference Committee Report, 21 Cong. Rec. 6426, 55th Cong. demonstrates congressional purpose.

"The local railroad and transportation companies and banks incorporated under any law are left to be dealt with by the laws of the State creating them."

When dealing with an exception to a statute, it is a basic rule of construction that such exemption or exception be narrowly construed. *Korherr* v. *Buml* 262 F.2d 157, 162 (9th Cir 1958); *Midland Cooperative Wholesale* v. *Ickes,* 125 F.2d 618, 626 (8th Cir. 1942). Previous judicial constructions of Section 4 narrowly construed exclusions from jurisdictions under the Bankruptcy Act. *In re: Bay Cities Guaranty Bldg. & Loan Association,* 48 F.2d 623, 624 (S. D. Calif 1931).

The case law supports the conclusion that only national and state banking corporations and not foreign banking corporations come within the exclusion of the Bankruptcy Act. Those cases contain statements by the courts expressing what they considered to be Congress' intention in excluding certain corporations from bankruptcy as well as Congressional intent in amending the Act in 1910. *In re: Supreme Lodge of the Mason's Annuity,* 286 F. 180, 184 (N. D. Ga. 1923), cited with approval by the Fourth Circuit in *Sims* v. *Fidelity Assurance Ass'n,* 129 F.2d 442, 448 (4th Cir. 1942), *aff'd* 318 U.S. 607 (1943).

The following quote from *Woolsey et al.* v. *Security Trust Company et al.,* 74 F.2d 334, 337 (5th Cir. 1934) contained in petitioner's proposed findings and conclusion is particularly expressive of the reasons for the exclusions under Section 4 and the chaos and confusion which is avoided by the operation of such exclusion.

> "The letter of that section excludes banking and insurance corporations; its spirit and purpose, to leave the liquidation of the banking corporations of the country to the well-organized departments of the states and the nation, organized for the purpose of supervising while they are going concerns and of liquidating them when they are not, excludes them. Federal laws provide elaborately for the supervision

> and liquidation of national banking corporations; the laws of the states do the same for state banks and insurance companies, in order to protect the millions of persons who deal with them on the faith of the protection afforded by direct governmental supervision and control. It was considered that it would be a ruinous thing to the state, to the depositors, and to the creditors to have the elaborate scheme of liquidation which the state provides broken into and nullified by bankruptcy proceedings, and it was intended by withdrawing jurisdiction over these corporations from the bankruptcy court, that this would not occur. It would be directly contrary to the purposes so definitely and comprehensively expressed to exempt banking corporations from the act, leaving their administration and liquidation to the state and federal systems devised expressly for them, to hold that this bank and trust company is not exempt, chartered though it was under the state banking laws, with banking privileges and powers, operated though it was under those laws, and not being liquidated as it is, under them."

Foreign banking corporations not doing business in the United States are not subject to Federal or State supervision while they are going concerns and there is no regulatory agency in the United States to govern their liquidation hence they should be and are subject to the benefits of, the Bankruptcy Act.

The scant writings in legal periodicals on this subject also seem to support the view Congress intended to exclude only national and state banking corporations and not foreign banking corporations.

"Journal of the National Association of Referees in Bankruptcy" (Vol 36, No. 2, 1962) by Charles Seligson and Lawrence P. King; "Revision of Conflicts Provisions in the American Bankruptcy Act," 1 *National and Comparative Law Quarterly* (4th Ser.) 483 (1952) London, England, reprinted in *Journal of National Association of Referees*

in Bankruptcy (Vol 27, No. 2) April 1953, under title "Revision of Conflicts Provisions in the American Bankruptcy Act" by Kurt H. Nadelmann.

The objectives of the Bankruptcy Act include a design to bring about an equitable division of the bankrupt's assets among its creditors and conversely to protect against one creditor obtaining unfair advantage over other creditors. *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941); 3 *Colliers* (14th Ed) Sec. 60.01 Pg 743.

Congress has provided a trustee in Bankruptcy through the Bankruptcy Act, a variety of remedies to accomplish the objective of equitable distribution among creditors as the Act related to individuals, partnerships and corporations. However, it excluded from that coverage those entities including "banking corporations" which would be liquidated under the supervision of experts in the banking field as provided by Federal laws governing national banks and State law for state banks.

As stated previously this alternative regulatory device for liquidation is not available in the case of a foreign banking corporation not doing business in the United States. The effect of finding that the petitioner is within the jurisdiction of this court is to support the Congressional objective of equality of distribution and allow the trustee herein to examine the merits of the movant's claims, judgments and liens and move, if necessary, within the framework of the Act to insure such equality among creditors.

The motions to dismiss the voluntary petition is [*sic*] denied in all respects.

SO ORDERED.

/s/ JOHN J. GALGAY

Dated: NEW YORK, N.Y.
December 19th 1974

APPENDIX D

BANKRUPTCY ACT

Sections 1(8), 1(23), 2(a)(1), and 4, 11 U.S.C. §§ 1(8), 1(23), 11(a)(1), and 22.

§ 1(8) "Corporation" shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint-stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument.

§ 1(23) "Persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are forbidden under this title shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees or of other similar controlling bodies of corporations. July 1, 1898, c. 541, § 1, 30 Stat. 544; Apr. 12, 1900, c. 191, § 34, 31 Stat. 84; Mar. 3, 1909, c. 269, § 1, 35 Stat. 838; May 27, 1926, c. 406, § 1, 44 Stat. 662; June 7, 1934, c. 426, 48 Stat. 926; June 25, 1936, c. 804, 49 Stat. 1921; June 22, 1938, c. 575, § 1, 52 Stat. 840; June 28, 1946, c. 512, § 1, 60 Stat. 323; July 7, 1952, c. 579, § 1, 66 Stat. 420; June 23, 1959, Pub.L. 86-64, § 1, 73 Stat. 109; July 5, 1966, Pub.L. 89-495, § 1, 80 Stat. 268.

§ 2(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be

hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

(1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or in any cases transferred to them pursuant to this title. July 1, 1898, c. 541, § 2, 30 Stat. 545; Apr. 12, 1900, c. 191, § 34, 31 Stat. 84; Feb. 5, 1903, c. 487, § 1, 32 Stat. 797; Mar. 3, 1909, c. 269, § 1, 35 Stat. 838; June 25, 1910, c. 412, §§ 1, 2, 36 Stat. 838, 839; May 27, 1926, c. 406, § 2, 44 Stat. 662; June 22, 1938, c. 575, § 1, 52 Stat. 842; July 7, 1952, c. 579, § 2, 66 Stat. 420; Sept. 25, 1962, Pub.L. 87-681, §§ 1, 2, 76 Stat. 570; July 5, 1966, Pub.L. 89-496, § 1, 80 Stat. 270; Oct. 19, 1970, Pub.L. 91-467, § 1, 84 Stat. 990.

§ 4 (a) Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this title as a voluntary bankrupt.

(b) Any natural person, except a wage earner or farmer, and any moneyed, business, or commercial corporation, except a building and loan association, a municipal, railroad, insurance, or banking corporation, owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial and shall be subject to the provisions and entitled to the benefits of this title. The bankruptcy of a corporation shall not release its officers, the members of its board of directors or trustees or

of other similar controlling bodies, or its stockholders or members, as such, from any liability under the laws of a State or of the United States. The status of an alleged bankrupt as a wage earner or farmer shall be determined as of the time of the commission of the act of bankruptcy. July 1, 1898, c. 541, § 4, 30 Stat. 547; Feb. 5, 1903, c. 487, § 3, 32 Stat. 797; June 25, 1910, c. 412, §§ 3, 4, 36 Stat. 839; Feb. 11, 1932, c. 38, 47 Stat. 47; May 15, 1935, c. 114 § 1, 49 Stat. 246; June 22, 1938, c. 575, § 1, 52 Stat. 845.

FILED
OCT 18 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-272

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,
Petitioner,

—v.—

ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,
Respondent,

and

BANK OF THE COMMONWEALTH,
Respondent.

No. 76-271

BANK OF THE COMMONWEALTH,
Petitioner,

—v.—

ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,
Respondent,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,
Respondent.

BRIEF OF RESPONDENT ISRAEL-BRITISH BANK (LONDON) LIMITED, BANKRUPT, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACK GROSS
SHELDON LOWE
Attorneys for Respondent Israel-British Bank (London) Limited, Bankrupt
41 East 42nd Street
New York, N. Y. 10017

Of Counsel:

BRUCE L. HELLER
KRAUSE, HIRSCH & GROSS

TABLE OF CONTENTS

PAGE

Opinions Below 2

Jurisdiction 2

Question Presented 2

Statutes Involved 2

Statement of the Case 3

REASONS FOR DENYING THE WRIT

I. The Issue Decided by the Court of Appeals Is a Very Narrow One and Limited in Its Practical Application and Does Not Justify the Granting of Certiorari 5

II. There Is No Question of Federal Law Which Justifies the Granting of Certiorari 9

III. The Decision Is Clearly Correct 11

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:

Clark v. *Williard*, 294 U.S. 211 (1935); Id. 292 U.S. 112 (1934) 15

In the Matter of Bankhaus I.D. Herstatt Kga. A.i.L. No. 74 B 1134 (S.D.N.Y. 1974) 7, 8

In the Matter of Banque de Financement S.A., Debtor, 75B764 (S.D.N.Y. 1974) 7, 8

PAGE

In the Matter of Israel British Bank B.M. Tel Aviv No. 74 B 1635 (S.D.N.Y. 1974) 7, 8

In the Matter of Israel-British Bank (London), Limited, Bankrupt, 401 F.Supp. 1159 (S.D.N.Y.), rev'd 536 F.2d 509 (2d Cir. 1976) 2

Rice v. *Sioux City Cemetery, Inc.*, 349 U.S. 70 (1954) 9

U.S. v. *Constantine*, 296 U.S. 287 (1935) 9

Statutes:

Bankruptcy Act (U.K.), 4 & 5 Geo. 5, c. 59, §126 (1914) 4

Bankruptcy Act (U.S.), Sections 2a(1), 4 and 67a(1); 11 U.S.C. Sections 11(a)(1), 22 and 107(a)(1) 2

Bankruptcy Rule 116(a)(2)(B) 2

Companies Act, 11 & 12 Geo. 6, c. 38, §222 (1948) 4

Other Authorities:

Address of Chief Justice Vinson before the American Bar Association, 69 S.Ct. V. VI. (1949) 7, 8

Supreme Court Practice 4th ed., Stern and Gressman, 1969 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-272

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,
Petitioner,

—v.—

ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,
Respondent,

and

BANK OF THE COMMONWEALTH,
Respondent.

No. 76-271

BANK OF THE COMMONWEALTH,
Petitioner,

—v.—

ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,
Respondent,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,
Respondent.

BRIEF OF RESPONDENT ISRAEL-BRITISH BANK (LONDON) LIMITED, BANKRUPT, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Israel-British Bank (London) Limited, Bankrupt ("IBB") prays that the companion petitions for writs of certiorari by Federal Deposit Insurance Corporation as successor in interest to Franklin National Bank ("FDIC") and Bank of the Commonwealth ("Commonwealth") (herein collectively "Petitioners") be denied.

Opinions Below

The opinions below are adequately stated in the petitions except that the opinion of the Court of Appeals is now reported at 536 F. 2d 509 (2d Cir. 1976).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petitions.

Question Presented

Does the provision of Section 4a of the Bankruptcy Act, 11 U.S.C. § 22(a), which excepts a "banking corporation" from the benefits of the Act as a voluntary bankrupt include a corporation organized under the laws of the United Kingdom, formerly engaged in the banking business with its place of business in London, and which never had a place of business, office or agent but only had assets in the United States, never qualified to do business as a banking corporation in the United States, never did business in the United States as a banking corporation and never was subject to the jurisdiction of any banking authority in the United States—national or state?

Statutes Involved

The statutory provisions involved are:

1. Sections 2a(1), 4 and 67a(1) of the Bankruptcy Act, 11 U.S.C. Sections 11(a)(1), 22 and 107(a)(1).

2. 116(a)(2)(B), Bankruptcy Rules, 1973.

Statement of the Case

Petitioners seek review of the decision of the United States Court of Appeals for the Second Circuit which is set forth in the Joint Appendix (JA-1-a).*

IBB was a British bank organized under the laws of the United Kingdom as a corporation, engaged in the banking business in London. It did no banking business in the United States, nor was it licensed in any state to do such business. It did borrow Eurodollars and U.S. dollars from American banks, including Franklin National Bank ("Franklin") and Commonwealth among others. It also maintained deposits in United States banks.

On July 11, 1974, a loan of Eurodollars was made available to IBB in London by Franklin, the principal and interest amounting to approximately $2,100,000, became due and was not paid. On July 15, 1974, a loan of U.S. dollars made available to it by Commonwealth in New York, in the amount of $500,000 plus interest, became due and was not paid.

On July 22, 1974, Commonwealth started an action against IBB in the Southern District of New York to recover its loan with interest. Commonwealth obtained an order of attachment in the sum of $515,385.42 plus probable interest on the basis of IBB's status as a non-resident defendant. The order of attachment was served on a number of banks in New York holding deposits of IBB.

On July 26, 1974, Franklin followed suit and obtained an order of attachment which was served on a number of banks in New York. Commonwealth made personal service

---

* References to the Joint Appendix filed by Petitioners are designated (JA- -).

on IBB in London on August 6, 1974, and obtained a final default judgment for $519,923.90, which was entered in the Southern District on September 11, 1974. Franklin itself is now being liquidated by FDIC.

On August 2, 1974, while these matters were proceeding in the federal court, IBB, being unable to pay its debts, voluntarily filed a debtor's petition for the winding up of its affairs, pursuant to Section 222 of the English Companies Act, 11 & 12 Geo. 6, c. 38 (1948), with the High Court, Chancery Division, of the United Kingdom. In the United Kingdom, companies (corporations) that are unable to pay their debts as they mature cannot be made bankrupt. Bankruptcy Act, 4 & 5 Geo. 5, c. 59, §126 (1914). Accordingly, companies go through the equivalent winding-up procedure prescribed by the Companies Act, 1948.

On August 6, 1974, a receiving order was made by that court constituting Arthur Thomas Cheek, Senior Official Receiver, as Receiver and Provisional Liquidator of the property of IBB.

On September 23, 1974, before Franklin could obtain a judgment, and before Commonwealth could compel payment of the default judgment it had obtained, IBB filed a voluntary petition in bankruptcy in the Southern District of New York under Section 4a of the Bankruptcy Act. IBB's voluntary petition in bankruptcy alleged that it had its principal place of business and its principal assets in London; and that it had property in the Southern District of New York. Upon the filing of its voluntary petition, IBB was automatically adjudicated a bankrupt. Franklin and Commonwealth promptly filed motions to vacate the adjudication and to dismiss the voluntary petition on the ground that the Bankruptcy Court lacked jurisdiction over the subject matter.

The Bankruptcy Court held that IBB as a foreign banking corporation that had not qualified to do business in the United States, or in any state therein, and that never had a place of business there, is a proper person entitled to the benefits of the Bankruptcy Act (JA-1-c through 10-c) and having invoked the jurisdiction of the Court, the Court is vested with jurisdiction over IBB pursuant to Section 2a(1) of the Bankruptcy Act and Rule 116(a)(2)(B) of the Bankruptcy Rules (JA-5-c).

The District Court for the Southern District of New York reversed the orders of the Bankruptcy Court on the ground that as a "banking corporation" IBB comes within the excepted persons who are not entitled to the benefits of the Bankruptcy Act. (JA-1-b through 30-b).

The Court of Appeals concluded that the petition in bankruptcy by IBB should not have been dismissed and accordingly reversed the order of the District Court (JA-1-a through 12-a).

REASONS FOR DENYING THE WRIT

I.

The Issue Decided by the Court of Appeals Is a Very Narrow One and Limited in Its Practical Application and Does Not Justify the Granting of Certiorari.

The issue in the present case is a very narrow one and limited in its practical application. It is whether a bank incorporated in a foreign country undergoing voluntary liquidation under the laws of such country, which is not engaged in business in the United States and hence not regulated by federal or state banking authority, but which has assets in the United States (a bank with such characteristics herein referred to as an "unregulated foreign

bank") is excepted as a "banking corporation" from the benefits of the Bankruptcy Act.

Our concern is not with foreign banking corporations which have been licensed to do business under the laws of a particular state and which are thereby subject to the regulation and supervision of its banking authorities. The number of such regulated foreign banks and the value of their assets, however quantitatively impressive, is irrelevant to the consideration of the question.

Nor is our concern with foreign banks which own all of, or a major interest in, stock in United States banking corporations, engaged in business in a state, even though there were 175 United States banking institutions owned by foreign banks and such United States banking institutions reportedly held assets totaling $57.3 billion (FDIC-5-Note 4).* Such banks are indeed regulated by special state or federal laws dealing specifically with their operation, supervision and liquidation and hence are clearly excepted from the benefits of the Bankruptcy Act. The "growing intimacy between foreign and domestic banking institutions" (FDIC-7) and "the growth of direct investment by foreign banking corporations in United States corporations" (FDIC-5) are clearly unrelated to the question and no prophecy of doom or gloom as to the impact of their liquidation on the stability of our banking system and its importance to our economy can invest the question before this Court with sufficient importance to warrant review by certiorari.

We are here concerned with a bank that never qualified to do business in the United States, owned no interest in United States banking institutions, whose creditors had

* References to the petitions are designated (FDIC-) and (Commonwealth-).

ample warning that the bank was insolvent when, prior to filing its petition under the Bankruptcy Act, it voluntarily sought liquidation under the laws of the United Kingdom because of its insolvency and which thereafter invoked the jurisdiction of the United States Bankruptcy Court to achieve equitable distribution of all of its assets—those located here and abroad—among all of its creditors, domestic and foreign.

To underscore the narrowness of the issue, only four cases of unregulated foreign banks* have surfaced during the entire history of the Bankruptcy Act, despite ". . . the growth of activity in foreign exchange transactions, the growth of domestic credit extended by foreign banking corporations and the growth of direct investment by foreign banking corporations in United States corporations, including domestic banking corporations." (FDIC-5)

Although each case presented the same interesting legal question of statutory construction and fell into the same fact pattern, the question is not one of wide or immediate importance beyond the particular facts and the parties involved, nor one involving "tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country" so as to warrant the exercise of certiorari jurisdiction.

> "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance be-

* The three cases in addition to the instant one have all been instituted in the Southern District of New York: *In the Matter of Bankhaus I.D. Herstatt KGaA iL*, Bankrupt, No. 74 B 1134, an involuntary bankruptcy petition; *Banque de Financement S.A.*, Debtor, No. 75 B 764, a Chapter XI proceeding; and *Israel-British Bank B.M. Tel Aviv* [the Israeli parent of respondent], Bankrupt, No. 74 B 1635 an involuntary bankruptcy petition.

yond the particular facts and parties involved". Address of Chief Justice Vinson before the American Bar Association, September 7, 1949, 69 S.Ct. V. VI.

Each unregulated foreign bank was ordered under the applicable law of its country by its bank supervisory authority to cease business and to liquidate (*Herstatt, supra*); the bank voluntarily sought dissolution (*IBB, IBB Tel Aviv, supra*); or the banking authorities ordered the bank to suspend operations and to apply to the courts to declare itself insolvent (*Financement, supra*).

The instant case and each of the other three cases of unregulated foreign banks have effectively been disposed of by the decision of the Court of Appeals for the Second Circuit, which Petitioner seeks to review. Within the context of Supreme Court Rule 19, the Supreme Court should not exercise its discretion to grant the petitions for certiorari. The decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter; nor is there any pending case in any other district or circuit from which such a conflict could arise. The Supreme Court should not grant certiorari to review a decision of a Federal Court of Appeals merely because it is in direct conflict on a point of Federal law with a decision rendered by a District Court, whether in the same circuit or in another circuit, particularly when the decision with respect to which a writ of certiorari is sought as in the instant case is a unanimous decision by a prestigious court—one presiding over the commercial and banking center of the United States and thereby particularly qualified by such experience to deal with the issue under discussion. The Supreme Court tries only to achieve uniformity in Federal matters among the various courts whose decisions are otherwise final in the absence of Su-

preme Court review—the Courts of Appeals, the Court of Claims and the highest State Courts in which decision may be had. It is the duty of the Courts of Appeal to maintain uniformity within their respective circuits and to supervise the decisions of the various District Courts. Where the Supreme Court in granting certiorari had noted the existence of a conflict between the decision of a Court of Appeals and cases in a District Court (see *U.S.* v. *Constantine,* 296 U.S. 287, 290 (1935)) it has done so without suggesting that such a conflict alone would justify the granting of certiorari. At most this type of conflict has been recognized as one factor tending to show the existence of some other and more effective basis for review—such as the importance of the question involved or the fact that the decision of the Court of Appeals is incorrect and contrary to the weight of authority. *Supreme Court Practice* 4th edition—Stern & Gressman; 1969, Section 4.8 at page 162.

II.

There Is No Question of Federal Law Which Justifies the Granting of Certiorari.

Although due recognition is given by the Supreme Court to the importance of the issues involved in the case as to which review is sought, such issues should be and must be of major significance and reflect the more important legal problems within the realm of its jurisdiction. The problem, though intrinsically important, must be beyond the academic or episodic, *Rice* v. *Sioux City Cemetery, Inc.,* 349 U.S. 70, 74 (1954).

Petitioners insist that implicit in the decision of the Court of Appeals, lurks an important question of federal law which this court should settle and to support its position

it sets forth extravagantly remote possible analogies to unregulated foreign banks with respect to which no proceeding is pending in the foreign country or origin for liquidation or rehabilitation of the foreign banking corporation. The mere listing of remote possible analogies such as

> "The likely consequence of another financial crisis similar to that experienced in the latter part of 1974 is that other bankruptcy proceedings involving foreign banking corporations will be filed if the decision below is left undisturbed. Such actions could present real dangers to the stability of our domestic banking system and the international banking community." (FDIC-5)

and

> "But the serious consequences which that decision portends in the field of both local and international banking and finance, as well as for bankruptcy jurisdiction generally, are matters that are of common concern and call for this Court's intervention." (Commonwealth-7)

does not create an important federal question.

In the instant case and each of the other cited cases, proceedings in the country of origin of the bankrupt had already commenced so that the creditors and the public had ample warning that the bank was insolvent and there was little reason for concern that the filing of the petition for bankruptcy would produce any more uncertainty in the banking system in the United States or internationally—than already existed. The threat to the stability of the United States banking system simply did not and could not exist under the facts and circumstances of each case and more particularly the case at bar.

III.

The Decision Is Clearly Correct.

The Court of Appeals correctly determined that subject matter jurisdiction existed under the Bankruptcy Act to adjudicate as a voluntary bankrupt an unregulated foreign bank.

IBB, being unable to pay its debts, voluntarily filed a debtor's petition for the winding up of its affairs in the United Kingdom (JA-3-a). Such filing occurred prior to IBB's filing its voluntary petition under the Bankruptcy Act.

The High Court in England issued an order authorizing the appointment of counsel in New York ". . . to take such steps and to institute such proceedings . . . to insure that the assets of the said company situate in the United States of America become available for the benefit of creditors general." (JA-3-a) The Court of Appeals reasoned that since IBB was entitled to the benefits of the Bankruptcy Act, then the bankruptcy proceedings here would "be in aid of the order of the High Court that the assets in the United States become available to the creditors on the basis of equality" (JA-3, 4-a) because

> "The theme of the Bankruptcy Act is equality of distribution of assets among creditors, *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941); *Buchanan* v. *Smith*, 83 U.S. (16 Wall.) 277, 301 (1873); *3 Collier on Bankruptcy* ¶60.01, at 743; see *Young* v. *Higbee Co.*, 324 U.S. 204, 210 (1945), and correlatively avoidance of preference to some. *1 Remington on Bankruptcy* §17, at 34 (5 ed. J. Henderson 1950). The road to equity is not a race course for the swiftest." (JA-7-a)

The Court of Appeals held that IBB, as a foreign corporation which has assets in the United States is amenable to bankruptcy here under Section 2 of the Act.

> "To find that it is excluded from the general class of entities amenable to bankruptcy one would have to find a reason which illuminates the exception. We can find no convincing reason why a foreign banking corporation, not licensed to do business in the United States, conducting no semblance of a banking business here, and not under the regulatory supervision of any state or federal agency, should not qualify for the benefits of the Act as a voluntary bankrupt." (JA-7-a)

The Petitioners, ignoring the facts of this case, more particularly that IBB was already in a winding up proceeding in the country of its origin and that it filed a *voluntary* petition under the Bankruptcy Act, urge that there is a strong argument to be made for preventing creditors from filing an *involuntary* petition against a foreign banking corporation in the United States in which it is not doing business, because it may be injured thereby through impaired public confidence in its own country. This has no relevance to the initial determination of jurisdiction in the case at bar because the bankrupt filed a *voluntary* petition. Further, it is without merit since a bank which is *in bonis* in its country cannot be put into jeopardy by a mere bankruptcy filing in the United States—certainly not in any more jeopardy than by the filing of attachments in the United States.

On the other hand, if attachments have occurred, timely filing of a petition can become a necessity to invoke the avoiding powers of the Bankruptcy Act for the equal protection of all creditors, domestic and foreign. The Court of Appeals said

> "This is a case where United States creditors could be harmed if preferential liens were permitted to survive." (JA-11-a)

Although the Petitioners were quick to quote from and cite the report of the National Bankruptcy Conference, Special Committee on Insurance Companies and Foreign Banks, Part 1 (FDIC-6, 7, 12) in support of their argument ". . . that the mere commencement of a bankruptcy proceeding in the United States against or by a foreign bank would undoubtedly have a devastating effect upon the particular institution and could impair the confidence of the public in the international banking community and our domestic banking system" (FDIC-6) (none of which happened even in ripple effect in the wake of the four cases that surfaced in the Southern District of New York, a major world and national money center) the Petitioners carefully and conspicuously omitted the only part of the Committee report relevant to the present case. The report comments, at pages 14 and 16:

> "The special characteristics of a bank, coupled with the pervasive supervision and regulation of the banking industry by Federal and State bank supervisory authorities which include special schemes for liquidation of insolvent institutions, amply justify the exemption of *domestic* banks from amenability to the jurisdiction of a bankruptcy court, as provided in present Bankruptcy Act §4 . . .
>
> "The same considerations also apply to *foreign* banks which are licensed by State banking authorities to engage in business in the United States and are subject to liquidation by a U. S. bank supervisory authority. Branches and/or agencies of foreign banks in the United States are permitted only by the laws

of six States—namely, California, Illinois, New York, Massachusetts, Oregon and Washington—where they are subject to supervision by State bank authorities as in the case of domestic banks. If there are deficiencies in the State liquidation procedures relating to foreign banks operating in a particular State, such deficiencies should be corrected by State legislation, as in the case of domestic banks operating in such State. In any event, questions involving the basic structure of the foreign banking industry in the United States are presently under intensive, and in many respects controversial, consideration by the Federal Reserve Board as well as by Congress, and it would be premature for this Committee to make recommendations until the outcome is settled. However, such considerations do *not* apply to a foreign bank which is not licensed in the United States. There is no Federal or State banking regulatory scheme dealing with such a bank or its assets.

"In the case of an unlicensed foreign bank, in order to accomplish the policy of the Bankruptcy Act to secure possession of a bankrupt's assets to effect an equitable distribution among all creditors and to ensure an equitable distribution as between domestic creditors and foreign creditors, there may be situations where the filing of a petition in the United States against the foreign bank may be necessary for the purpose of collecting assets or setting aside preferences or fraudulent transfers. A foreign bank may wish to institute a voluntary proceeding in order to defend itself against a multiplicity of law suits."

Petitioners contend that the Court of Appeals erred in substantially shifting the allocation of power over local property between the state and the federal Government by

denying to the state the power to decide whether to recognize the theme of equality of distribution, adopt some alternative theme, or submit the excepted corporation to dismemberment in the interest of protecting local creditors however great the inequality. To support this contention, they rely heavily on *Clark* v. *Williard*, 294 U.S. 211, 214-15 (1935) and 292 U.S. 112, 123 (1934) (FDIC-10, Commonwealth-10). But this reliance is a distortion of the cited cases without regard to our federal system. The Court of Appeals stated:

"Those cases only held that the full faith and credit clause did not prevent one state from favoring its local levying creditors over a liquidator appointed by another state, insofar as claims to local property were concerned. They were not in any sense an interpretation of the Bankruptcy Act, nor an endorsement of what Justice Cardozo termed 'a policy to allow the assets of an insolvent corporation to be torn to pieces at the suit of rival creditors when they could be distributed equally and without sacrifice at the hands of a receiver.'" (JA-11-a)

These cases elide the essential federalisim implicit in the Bankruptcy Act in reading federal statutes. The Court of Appeals admonished that

"In reading federal statutes, we must also remember that the statutes are written with our federal system in mind. They normally reflect divisions of power between the federal government and the states of the union. Courts over the years have recognized that Section 4 provides for a division of power between the federal government and the states. See *In re Union Guarantee & Mortgage Co.*, 75 F. 2d 984 (2 Cir.), *cert. denied*, 296 U.S. 594 (1935); *Woolsey* v. *Security Trust*

Co., 74 F.2d 334, 337 (5 Cir. 1934); *In re Equity Funding Corp. of America*, 396 F. Supp. 1266, 1275 (C.D. Cal. 1975); *In re Supreme Lodge of the Masons Annuity*, 286 F. 180, 184 (N.D. Ga. 1923)." (JA-8-a)

In Section 4, the Congress, contrary to the contention of the FDIC (FDIC-10), *has* exercised its bankruptcy power in Article 1, Section 8 of the Constitution by making a foreign corporation with assets in the United States amenable to the Bankruptcy Act, and by excluding "banking corporations" from the benefit of the Bankruptcy Act for the reasons found to exist by the Court of Appeals in its examination of legislative history and in its search for Congressional intent. (JA-8-a through 10-a)

It found that there was a legislative purpose for the general exception of banking corporations, but concluded that

> "When the statute is couched in terms of an exception, however, the task is somewhat different, for in the case of an exception we can hardly assume that excluding a particular category from a general class was utterly without purpose. If we find that there was a legislative purpose for the general exception which does not fit the narrower exception at issue, a court may justifiably conclude that the exception at issue is without the statute." (JA-6-a)

It found no Congressional purpose or clear manifestation of intention to command that an unregulated foreign bank, such as IBB be deemed a "banking corporation" within the meaning of Section 4a of the Bankruptcy Act.

> "If we acknowledge, as did the District Court, that Congress failed to consider *foreign* banking corporations when creating the exceptions to eligibility for bankruptcy, are we, nevertheless, required to recognize within the exception what was never in its consideration? There is no plain meaning in 'banking corporation' to compel such a result. See *McBoyle* v. *United States*, 283 U.S. 25 (1931), where Justice Holmes found that an airplane was not a 'motor vehicle' though it was propelled by a motor." (JA-6-a)

In summary, there exists no special and important reason for the Supreme Court to exercise its discretion under Supreme Court Rule 19 to grant the petitions for certiorari. There is no important question of federal law which has not been but which should be settled by this Court, nor has the Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court, nor has the Court of Appeals departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for this Court's power of supervision. The issue is narrow and applies only to unregulated foreign banks which are already the subject of liquidation or rehabilitation proceedings in the country of origin, a small and relatively unimportant segment of the foreign banking community, which do no business in the United States and merely possess assets here. There is no activity by such unregulated foreign banks that has any impact of significance on the banking activities of state or federal banks in the United States. The exercise of bankruptcy jurisdiction over the assets of such unregulated foreign banks in the United States is a proper exercise under the Bankruptcy Act and the unanimous decision of "the esteemed panel constituting the Court of Appeals in this case" (Commonwealth—6) is correct and should be left undisturbed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JACK GROSS
SHELDON LOWE
Attorneys for Respondent
Israel-British Bank (London)
Limited, Bankrupt
41 East 42nd Street
New York, New York 10017

Of Counsel:

BRUCE L. HELLER
KRAUSE, HIRSCH & GROSS

Supreme Court, U. S.
FILED
OCT 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-272

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,
Petitioner,
v.
ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,
Respondent,
and
BANK OF THE COMMONWEALTH,
Respondent.

No. 76-271

BANK OF THE COMMONWEALTH,
Petitioner,
v.
ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,
Respondent,
and
FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,
Respondent.

REPLY BRIEF OF PETITIONERS FEDERAL DEPOSIT INSURANCE CORPORATION AND BANK OF THE COMMONWEALTH

JOHN J. WALSH
EARL H. NEMSER
Attorneys for Petitioner
Federal Deposit Insurance
Corporation

Of Counsel:
C[illegible]WALADER, WICKERSHAM & TAFT

ARTHUR H. SCHWARTZ
Attorney for Petitioner
Bank of the Commonwealth

Of Counsel:
HERBERT P. JACOBY
BURNS & JACOBY

TABLE OF CONTENTS

	PAGE
I. THE PRINCIPLE OF FEDERALISM	2
II. THE IMPORTANCE OF THE ISSUE	5

TABLE OF AUTHORITIES

Cases:

Clark v. *Williard*, 294 U.S. 211 (1935) and 292 U.S. 112 (1934) 2

OTHER AUTHORITIES

Wechsler, *The Political Safeguards Of Federalism: The Role Of The States In The Composition And Selection Of The National Government*, 54 Colum. L. Rev. 543 (1954) 3

Hart, *The Relations Between State And Federal Law*, 54 Colum. L. Rev. 489 (1954) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-272

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,
Petitioner,

v.

ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,
Respondent,

and

BANK OF THE COMMONWEALTH,
Respondent.

No. 76-271

BANK OF THE COMMONWEALTH,
Petitioner,

v.

ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,
Respondent,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,
Respondent.

REPLY BRIEF OF PETITIONERS FEDERAL DEPOSIT INSURANCE CORPORATION AND BANK OF THE COMMONWEALTH

Petitioners Federal Deposit Insurance Corporation and Bank of the Commonwealth respectfully submit this reply brief addressed particularly to certain arguments first raised by Respondent in its brief in opposition to the companion petitions.

1. THE PRINCIPLE OF FEDERALISM

Respondent appears to argue that the principle of federalism has been overlooked by Petitioners and somehow overlooked by the Court in its decisions in *Clark* v. *Williard,* 294 U.S. 211 (1935) and 292 U.S. 112 (1934). (IBB at 15).* Rather than "elide" that principle as it finds expression in the Bankruptcy Act ("Act"), as Respondent suggests, the Court in *Clark* v. *Williard* expressly noted that Congress apportioned jurisdiction between the federal government and the states:

> "[I]nsurance corporations, *like banks,* are excluded from bankruptcy altogether (11 U.S.C. § 22b), and must submit to dismemberment, however great the waste or inequality, unless receivers are appointed." 292 U. S. at 123-124. (Emphasis added.)

In *Clark* the Court had indicated that each state is the "ultimate authority" with respect to local property of excluded entities, although most states give priority to a duly appointed liquidator. *Id.* at 123.

In terms of federalism, the question presented is whether New York law or the federal Act will determine if attaching creditors are to be preferred over Respondent's official liquidator (representing its creditors world-wide) with respect to local property? Put another way, may New York determine whether to protect the interests of local creditors?

If the states through their representatives in Congress applied the principle of federalism to reserve authority over local property of domestic banks or insurance companies, one may ask whether there was any reason to relinquish such authority over local property of foreign banks or insurance companies? Respondent suggests no

*References to Respondent's brief are designated (IBB) followed by the appropriate page number.

reason. Yet the burden of persuasion clearly rests upon it in view of the generic exclusionary language adopted by Congress in Section 4 of the Act.

We submit that Respondent, having that burden, has relied, as did the Second Circuit, on a misconception of the principle of federalism for a quick resolution of the issue presented. Professor Herbert Wechsler observed on this very point:

> "National power may be quite unquestioned in a given situation; those who would advocate its exercise must none the less answer the preliminary question why the matter should not be left to the states. Even when Congress acts, its tendency has been to frame enactments on an *ad hoc* basis to accomplish limited objectives, supplanting state-created norms only so far as may be necessary for the purpose.*** As Henry Hart and I have put it elsewhere: 'Congress acts . . . against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.' As a state legislature views the common law as something to be left alone unless a need for change has been established, so Congress has traditionally viewed the governance of matters by the states.
>
> *The tradition plainly serves the values of our federalism insofar as it maintains a burden of persuasion on those favoring national intervention."*
>
> Wechsler, *The Political Safeguards Of Federalism: **The Role Of The States In the Composition And Selection Of The National Government,*** 54 Colum. L. Rev. 543, 545 (1954). (Emphasis added.)

Neither Respondent nor the Second Circuit remotely suggest that this important burden has been met.

Respondent's puzzling reliance on federalism hardly answers the question—rather it underscores the delicate nature of the issue of federal-state relationships.

Should the judiciary by novel interpretation and negative inference occupy a field which Congress reserved for the states and through the mechanism of the Bankruptcy Act regulate the liquidation of the local property of a foreign banking corporation (or insurance or railroad corporation); or should this field be preserved for the states by the judiciary until the representatives in Congress elected from the states relinquish it by clearly and expressly placing it in the federal sphere?

For some reason the court below presumed that the states are not competent to deal equitably with local assets of a foreign bank, although they admittedly can administer the local assets of a sister state domestic bank. But the states have proven competent and if their represenatives in Congress appear to have expressly retained this authority, the judiciary is without power to make a superseding judgment. As Professor Henry Hart noted:

> "In wide areas, accordingly, a state law continues to operate not by virtue of the Tenth Amendment but by virtue only of the non-exercise of latent federal powers, furnishing impressive evidence of the practical worth of the state governments." Hart, *The Relations Between State And Federal Law,* 54 Colum. L. Rev. 489, 526 (1954).

Respondent does not urge judicial interpretation to expand federal jurisdiction into an unregulated field. This is a case where state law otherwise controls and, in the absence of a contrary decision, for the last three-quarters of a century such control has been unquestioned. Accordingly, the decision below diminishes the states' authority to administer property within their borders and determine whether and how to protect the rights of local creditors engaged in business dealings with foreign entities. Nor have the states taken this authority lightly as evidenced

by the expanding breadth of *quasi in rem* jurisdiction and state long-arm statutes.

When viewed against the considerations Respondent urges, the issue presented is one for the Congress, not the courts. Consequently, the judicial expansion of federal jurisdiction which Respondent would have this Court leave unexamined will have a corrosive effect on the principles of federalism, judicial restraint and—most importantly—separation of powers.

II. THE IMPORTANCE OF THE ISSUE

The effect of the decision below is not limited to a narrow, academic or episodic set of facts as Respondent *now* would have this Court believe.* Since the *same* operative language appears in Section 4 of the Bankruptcy Act regarding banking, insurance and railroad corporations, the result in this case will govern whether such foreign entities are subject to voluntary and involuntary proceedings under the Act, including proceedings under Chapters X and XI. Accordingly, the question concerns every such entity outside the United States world-wide which has assets in the United States and each such entity's creditors;

---

*It is indeed the rare case where all parties to a Petition for Certiorari insist that the question presented is of sufficient importance to deserve the attention of the Court. In this regard it is significant to note that before Respondent took the about-face expressed in its opposition, it opened its brief below with the following language:

> "The court below recognized that the issue presented by this appeal is one of first impression and is of great significance to the international banking community. The *same* issue has been presented in [*Bankhaus I.D. Herstatt*] an involuntary bankruptcy petition; [*Banque de Financement*] a Chapter XI proceeding; and [*Israel-British Bank Limited*, the Israeli parent of Respondent] an involuntary bankruptcy petition * * *." (Emphasis added.)

it will subject all such assets to administration in federal bankruptcy proceedings.

In an attempt to minimize the significance of the issue presented, Respondent stresses that to date "only four cases of unregulated foreign banks have surfaced." (IBB at 7). Yet it fails to disclose that all four of such cases arose within a few months of one another during the 1974-75 recession. That circumstance tends to demonstrate that for many decades the proposition that the exclusionary language of Section 4 of the Act meant exactly what it said had been uniformly recognized. Now that the Second Circuit has ruled to the contrary, the likelihood that the next ill wind that blows will be followed by another spate of similar proceedings—voluntary and involuntary—has been infinitely multiplied. The recurring nature of the question, absent reversal, will be limited only by the recurring nature of economic crises around the world.

Petitioners Federal Deposit Insurance Corporation and Bank of the Commonwealth urge the Court to consider the question presented now rather than permit another economic downswing to set the stage for new litigation involving these issues.

Nor should the fact that other circuits have not considered the question presented diminish the need for prompt review. As Respondent indicates, the Second Circuit presides over "the commercial and banking center of the United States." (IBB at 8). Therefore, on those occasions

when that court is incorrect in an area of national—and international—economic importance, it is incumbent on this Court to correct it.

Respectfully submitted,

JOHN J. WALSH
EARL H. NEMSER
Attorneys for Petitioner
Federal Deposit Insurance Corporation

Of Counsel:
CADWALADER, WICKERSHAM & TAFT

ARTHUR H. SCHWARTZ
Attorney for Petitioner
Bank of the Commonwealth

Of Counsel:
HERBERT P. JACOBY
BURNS & JACOBY

see

76

272